UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ARKEMA, et al.,	)	Case No. CV05-5087 RBL
Plaintiffs,	)	Tacoma, Washington
vs.	)	June 13, 2007
ASARCO, INC., et al.,	)	
Defendants.	)	

CLOSING ARGUMENTS OF COUNSEL
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

Court Reporter: Nichole Rhynard, CCR, CRR, RMR
Union Station Courthouse, #3100
1717 Pacific Avenue
Tacoma, Washington 98402
206.370.8504

Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

APPEARANCES:

For the Plaintiff General Metals:
Mark M. Myers
Timothy Ashcraft
Williams, Kastner & Gibbs
601 Union Street, #4100
Seattle, Washington 98101
206.628.6611

For the Plaintiff Arkema:
John D. McCarthy
Holme Roberts & Owen
1700 Lincoln, #4100
Denver, Colorado 80203
303.861.7000

Stephen T. Parkinson
Groff Murphy Trachtenberg & Everard
300 East Pine Street
Seattle, Washington 98122
206.832.1484

For the Defendant Weyerhaeuser:
Mark D. Coldiron
Keith J. Klein
Ryan, Whaley & Coldiron
900 Robinson Renaissance
119 North Robinson
Oklahoma City, Oklahoma 73102
405.239.6040

Also present: Kimberly Hughes, Weyerhaeuser

June 13, 2007 - 9:00 a.m.

* * *

THE COURT: Please be seated. Good morning.

Okay. Anything we need to take up before we start with closing arguments?

MR. MYERS: Not that I'm aware of.

THE COURT: How do you want to split it or are you going to split it?

MR. MYERS: Mr. McCarthy and I are going to Oreo the first part of our opening -- closing, excuse me.

THE COURT: That was mean.

MR. MYERS: Then we're hopefully going to take less than two hours in ours, if necessary.

Your Honor, while things are getting warmed up here I guess I can start. I'll hand up, just for the Court's courtesy, a copy of the PowerPoint Mr. McCarthy and I are going to go through.

I would like to start out just by giving a 40,000-foot-level look of the case, although here it's more like a $40-million look at the case. We have an allocation, CERCLA costs, we have Arkema and General Metals and we have Weyerhaeuser.

For cost paid, $41,141,753. That's the net dollar amount. Weyerhaeuser, zero. The proposal that we made in our case is to break it between the two, Arkema and General Metals, $33,350,000; Weyerhaeuser, $7,792,000, or 81.06 percent and 18.94 percent. Weyerhaeuser's allocation, zero.

One of the major issues in this case is orphan share. There has been a tremendous amount of testimony about Kaiser, their other orphans, such as Asarco, that were significant polluters to the waterway.

So, orphan share, Arkema and General Metals' proposal is fair share. Probably more accurately, equally unfair. Weyerhaeuser proposal on orphan share, zero.

To go back, low these many weeks ago, when we first started I discussed CERCLA's objectives. They are to clean up the environment at the liable party's expense, to be equally unfair to all liable parties or share the pain, and to allocate based on rough justice.

Questions to answer in this case: One, is Weyerhaeuser a liable party under CERCLA and or MTCA? Number two, is wood waste a hazardous substance under CERCLA or MTCA? Three, what are the sources of wood waste in chemicals in CO-14 and Weyerhaeuser's property? And lastly, how much of the $41 million in response costs incurred by Arkema and General Metals should be allocated to Weyerhaeuser in fairness, in equity and rough justice.

Weyerhaeuser is a liable party. This Court has already determined that Weyerhaeuser is liable under CERCLA. And because of this, the remainder of the Court's determination under CERCLA is based on equity, fairness. Weyerhaeuser is also liable party under MTCA. I think that's undisputed, though I may be wrong on that.

So let's talk about allocation and equity. Plaintiffs' allocation is to seek an allocation of cost based on property ownership and property use, the CO-14 issue, the release and threatened release of hazardous substances from Weyerhaeuser's property and operations, its own contribution to the problem and the costs that were incurred. And then, number 3, an equitable share of the orphans.

Weyerhaeuser's allocation, on the other hand, is based upon it paying nothing for wood waste in CO-12 or 13 where its log rafts were parked every day or almost every day for 14 years. It pays nothing for any of the orphans, even though they are a sizable, if it not predominant, share. And they pay -- and they're responsible only for wood fibers in CO-14 not the associated dirt, junk, pilings, or any chemicals on their own property.

So out of the $41 million in unreimbursed costs to Arkema and General Metals they seek to have Weyerhaeuser pay the cost to clean up their property, CO-14, and the cost to clean up wood waste in CO-9, 12, 13 as testified by Dr. Floyd and

Mr. Fuglevand. Therefore, the dollar amount that has been computed is the 792,000 figure we've discussed in testimony.

Now, Weyerhaeuser's strategy in this case is to argue for every loophole, every legal exception they can think of, every nuisance they can argue under the law to get out of paying anything, anything for the thousands and thousands of tons of wood waste as well as chemicals that they deposited on their own property and elsewhere that Arkema and General Metals have paid huge costs to clean up. They take no responsibility for their own property.

They argue chemicals caused everything, wood waste caused nothing. They take no share of the orphan parties and they argue that their expert's revised trial opinions given here in court today should be given more weight than the information they gave to EPA and Ecology back at the time when decisions were made.

Yet at the time cleanup decisions were made, and at the time substantial work was done and at the time millions of dollars were spent to clean up their waste as well as the waste of others, everyone acknowledged, everyone acknowledged that wood waste was damaging the environment and had to go.

My client, Mr. McCarthy's client, paid millions of dollars to clean up Weyerhaeuser's waste. Weyerhaeuser did not pay anything. Again, millions of dollars were spent dredging wood waste and PAH contaminated sediments on Weyerhaeuser's

front and elsewhere. Arkema and General Metals were not the source of the wood waste and PAHs. Kaiser is bankrupt. Weyerhaeuser has paid nothing.

So going to Question No. 1: Is Weyerhaeuser a liable party? The answer is yes under both CERCLA and MTCA. Weyerhaeuser is liable because they purchased contaminated property, property that had already been impacted by Kaiser. They purchased the property from Kaiser. Weyerhaeuser is a source of hazardous substances. They were designated a PRP by Ecology -- or by EPA in 1989. They were designated a PLP by Ecology in 1997. They were found liable by this Court. CERCLA remedial action costs were incurred. Again, Weyerhaeuser has paid nothing towards those.

Weyerhaeuser is liable -- is the liable party for CO-14. There is no dispute that CO-14 is Weyerhaeuser's property both through ownership and exclusive operation. There is no dispute that Weyerhaeuser disposed of tons and tons of wood waste in CO-14 that caused environmental damage. And there is no dispute that Weyerhaeuser released hazardous substances from its wood waste piles, from its operations, and from the pilings, the creosote pilings in CO-14.

The dispute that we've spent six weeks focusing on is more the amount of the releases, not whether releases occurred. In CO-s 12 and 13 there is wood waste from Weyerhaeuser's log rafts. They were the last standing wood waste parties.

Everyone else has settled out or gone out of business and is an orphan.

From the testimony of Foss Maritime and the rafting folks, Weyerhaeuser log rafts were tied up in those areas on an almost daily basis from at least 1988 to 2002. From Weyerhaeuser's own study in 1979 they found that log rafting and storage caused environmental damage, disposed of wood waste on the bottom can environmental damage.

Lastly, Dr. Floyd's conflicting testimony, in July of 2006 she claimed that 5 percent share should be attribute to people towing log rafts by. Now she's changed her story and she says log rafting doesn't deposit anything.

THE COURT: Let me interrupt you for a second. I'll probably do this with some frequency. You indicated in answer to Question 1 that there is no dispute that Weyerhaeuser released hazardous substances from its wood waste. Explain that, if you would. I know the issue of the PAHs being attached to the wood.

MR. MYERS: Correct.

THE COURT: That may be what you're talking about. Or Mr. Farlow talked about, I think, liken on the wood that is with it when it's live when it's cut and so forth.

What is it you're talking about that there is no dispute that Weyerhaeuser released hazardous substance from its wood waste?

MR. MYERS: What I'm focusing on is the data showing that in these huge wood waste piles there were releases of hydrogen sulfide --

THE COURT: Okay.

MR. MYERS: -- on Weyerhaeuser's property that Dr. Floyd testified and admitted on cross-examination that those -- that that substance was the result of the decomposition of the wood. That is a release of a hazardous substance.

THE COURT: Well, the question -- you know, I spent a lot of time reading cases and re-reading cases. And we talk about hazardous substances within the material -- I mean, they focus on whether or not the material is contained within the PVC cases, even the sludge in the Motorola case.

What is contained within the material? And I guess that is where we're -- you know, that is where we're at. As I indicated yesterday, my sense is that if wood debris is going to be regulated as a hazardous substance, the issue ought to be taken on frontally by EPA in a rule-making process so that the best wood scientists in the country can be heard.

I don't think we heard the best wood waste -- wood chemists. I think Dr. Floyd may qualify as a wood chemist given her experience, et cetera, et cetera. Basically I'm not saying that wood doesn't contain hazardous substances, what I'm saying is I don't think any evidence produced at

this trial it can be said by a preponderance of the evidence that would contain hazardous substances which leads us to nibble around the edges, so to speak.

There is no question that these hazardous substances that are produced are dependent upon the wood debris. What I'm trying to do is avoid naming the alfalfa farmer a PRP because ultimately that alfalfa gets turned into methane.

And that's kind of what I've been wrestling with on this issue of whether or not Weyerhaeuser released hazardous substances --

MR. MYERS: Here is the distinction that I think is important here. The cases that I think you're referring to, and the cases that I certainly looked at in preparation for summary judgment, those cases looked at somebody generating a waste, depositing it someplace else, and then the issue is if it's on someone else's property and it does things, was the release, the disposal of that material initially that went on somebody else's property? Here you have Weyerhaeuser owning and operating the property. They have deposited these piles of wood waste, volume of wood waste knowing at least since 1979 that that has the likelihood of creating hydrogen sulfide and other adverse environmental effects and from that waste material on their property there have been releases of hazardous substances.

There is nothing in the statute that says the original

material has to be a hazardous substance or anything generated from that later on is not a hazardous substance. That's not what the law says.

THE COURT: I understand that, but I've read ALR articles and every case I've seen, every case that Mr. Lane has found for me, the hazardous substance has been something that was contained within the waste material, not something that attach -- and clearly, even then the debate is over whether or not it's inert or not inert. That's the argument Asarco kept making. The issue was whether or not -- and the word "generate," then, is associated with that debate.

Is it foreseeable that through some chemical reaction the hazardous substance that is already contained within the PVC, or whatever it is, can dissociate from the material and be released or leached or whatever? That may be a conservative interpretation of the language. I know that the statute is to be viewed liberally with its broad remedial purposes in mind, but surely there should be some thread that the Court can rely upon in reaching the conclusion that a substance that is not hazardous in and of itself and contains, or at least the evidence doesn't convince me that it contains hazardous substances, nevertheless can be a hazardous substance at some later time when microbial action results. I get the foreseeability. I mean, I understand that. And that is why I was wrestling with the Well, could it be a

threatened release?

MR. MYERS: It certainly could be a threatened release, Your Honor. I harken back to my earlier days practicing environmental law when I had more hair and less gray, and the primary sites at that time were landfill sites where we dealt with this issue of dealing with garbage, municipal solid waste, that is not a hazardous substance, yet when it's placed into a particular environment on somebody's property it does generate a hazardous substance. Generates leachate, it generates methane, and under those circumstances there are a laundry list of Superfund sites in Western Washington that are landfill sites.

This basically is a solid waterway landfill. It may not have been intended that way, but what you have over the years Weyerhaeuser operated, you have -- you have feet and feet and feet of wood waste that is deposited through these industrial business activities in the waterway. And by doing so, that activity has resulted in a process that generates hazardous substances and releases them to the environment. And they're released at a facility which is Weyerhaeuser's property.

And I found nothing in the statute that requires the initial action to be a hazardous substance. What they focus on is: What is the result? what is the result to the environment? what is happening on someone's property? And here on Weyerhaeuser's property you have the generation of

the substances through an industrial process --

THE COURT: You would say at CO-14 basically Weyerhaeuser is the owner and operator of a landfill.

MR. MYERS: Correct.

THE COURT: That would be your argument?

MR. MYERS: Correct. It's fully consistent with Dr. Michelsen's testimony that wood waste in these concentrations is solid waste. Solid waste falls under the regulations that -- for a landfill.

THE COURT: I remember her argument is everybody was scared to death it was going to be regulated as solid waste and they choose not to do that.

MR. MYERS: They wanted to have it regulated under the SMS so they would have options to look at whether, in fact, it was causing environmental damage or not causing environmental damage. Nonetheless, if wood waste comprises a certain volume, it was Dr. Michelsen's testimony that is a solid waste under Washington law.

Where were we?

THE COURT: You had more hair and less gray.

MR. MYERS: You're very omniscient.

That is my next slide, talking exactly this subject about there being a release or threatened release of a hazardous substance and there being nothing in the statute that requires the initial source to be a hazardous substance.

Instead, it looks at Are hazardous substances being released? Is it being released from a facility? "Facility" is defined very broadly as anywhere hazardous substances otherwise come to be located. Very broad definition.

And lastly, the term "release" is also very broad. Spilling, leaking, pumping, emitting, escaping, leaching, dumping, all those activities.

And here we have in our case, we have PAHs from creosote piles that were admittedly released. There is a dispute as to how much, but the evidence is that there were widespread creosote smell, there is a creosote sheen when sediments were dredged, and so it's not molecules as Dr. Floyd testified. You couldn't smell it if it was molecules. This is a pervasive widespread problem in the sediments.

You have hydrogen sulfide from the wood waste in porewater. You have a hydrogen sulfide smell documented clearly. Phenols and methyl phenols from wood waste, it's our continuing position that the science says there is -- there are phenols and methyl phenols. That certainly is the DOE and EPA's position on that issue.

There is a threat of ammonia. It may or may not happen under certain circumstances, but there is certainly a threat.

Lastly, there is threat of other chemicals, those listed in the famous Footnote 2 to Allison Hiltner's November 3, 1998, letter Exhibit No. 418. There's a few exhibits I have

memorized.

We showed this exhibit and walked through its importance with the witnesses and how it was prepared. This shows where those smells were noted when the dredging was underway. And it shows significant areas of strong hydrogen sulfide, particularly around the wood waste deposits. It shows creosote smells in the sediment. There is no testimony that wet scrubber sludge smells like creosote. Creosote is a unique smell. For those of us who have lived here all our lives, we know the smell. The witnesses that have testified, they know the creosote smell.

THE COURT: Problem is we don't know what wet scrubber sludge smells like.

MR. MYERS: Thing is, though, if wet scrubber sludge did have a smell wouldn't it be documented someplace? If it had a unique smell wouldn't it have been in the Landau report?

THE COURT: One exhibit where they had it had a petroleum odor.

MR. MYERS: But if it had a creosote odor, wouldn't someone, a professional in that area living in the Pacific Northwest, note it has a creosote odor? Of course they would. There is nobody who has testified that it has a creosote smell. In fact, I think our experts -- Mr. Dalton testified he spoke to Paul Skillingstad at the DOE, he spoke

to the folks at Kaiser, and both of them said it doesn't have a creosote smell. Weyerhaeuser's experts, they didn't talk to anybody. They had no idea what it smelled like.

This exhibit number is Figure 513 from the cleanup study report that documents the release of hydrogen sulfide from the wood waste into the porewater to release into the environment. Dr. Floyd admitted as much.

Now, Weyerhaeuser, in our opinion, argues only half the story. Their case focuses only on the wood itself, not on what happens on their property after the wood waste is disposed of. Weyerhaeuser ignores the known hazardous substances that are released from wood waste in a low oxygen environment.

It's undisputed that CERCLA and MTCA hazardous substances have been released to the environment on Weyerhaeuser's property or facility. And it's undisputed that the hydrogen sulfide concentrations on Weyerhaeuser's property were above toxic levels. They weren't at insignificant minor levels. They were above toxic levels that the Wood Debris Group documented in their own report.

Question No. 2: Is wood waste a hazardous substance? What is Weyerhaeuser's position? Well, Weyerhaeuser for 20 plus years has known that wood waste from log storage caused environmental damage. It's EPA's position that wood waste

does cause environmental damage and is a hazardous substance and that is certainly the Department of Ecology's position.

THE COURT: Aren't those two separate questions? I dealt with regulators -- I tried to avoid it as much as I possibly could and just deal with the trial work. That's what I enjoy.

But, you know, I have to tell you, I look at this evidence through a lens that asked the question first, what is it that is motivating these people at the time they're making these determinations? And oftentimes it seems to me that the regulators, and I've used this phrase in chambers, sort of make these decisions the same way Dick Butkus searched out the guy with ball. They tackled the whole back field and drove the ones until they find the ball.

I'm sure you've experienced that in your career as well. My ultimate conclusion is this is an important enough issue to lots of regions in the country that it ought to be dealt with in a forthright manner, not with somebody writing a letter here referencing a secret memo that we can't let you have and so forth and so on. I find that almost a little offensive.

MR. MYERS: Your Honor, in 1998 I found that offensive too. We fought that.

THE COURT: I am sure you did.

MR. MYERS: We were under an order where we had to

comply with EPA's directives. That's part of the administrative order on consent. I remember as a young lawyer meeting with EPA on one of the early sites I worked on and I argued with them that's unfair, it's incorrect, it's not proper, it's not legal. And their lawyer looked me right in the eye and said, Mark, some days it's good to be king.

THE COURT: That was the phrase that I was thinking of. You and I are on the same wavelength. The problem is that -- you know, we're in a different forum right now. And we're at the forum where widespread precedent could be set. I'm not ignoring the likelihood that the Ninth Circuit at least will probably be the final arbitrator of this decision. And at least where I come from it isn't always good to be king. And some rational process needs to be followed in order for such important conclusions to be reached. I've said my peace.

MR. MYERS: One comment on that as a private here in the courtroom is that there was an opportunity to address this by the Wood Debris Group in the late 1990s. They were being told that's an important issue, huge issue for them, an issue that they have spent six weeks litigating over.

In mid to late 1996 what did they do to address this issue? They ran to the Department of Ecology and said, Please regulate us separately so we don't have to go through the EPA process. Make somebody else go through the EPA

process but regulate us separately.

You heard Mr. Fuglevand's testimony. He said when this issues came up, This is crazy, this is nuts. We fought it. EPA had a reason. They had a reason that, at that time anyway, was logical, although disputed, and they had a reason that had scientific basis behind it. Although now it's disputed at trial here, Weyerhaeuser disputes that that sign --

THE COURT: It seems they came up with the perfect compromise and said, We've got the ability to regulate wood under a separate state standard. Let's separate them. Problem is when you mix chemicals and wood you've got a large disputed territory.

MR. MYERS: That's assuming that this split was asked for or planned by the regulators. That's not the case. That wasn't the testimony of Mr. McMillan --

THE COURT: I don't know if it was found by regulators.

MR. MYERS: -- Dr. Michelsen, it's the wood debris folks that went to Ecology after they knew they were going to get wrapped into in. They went to Ecology and said, Please regulate us separately. This was not an allocation that was done by the regulatory agencies.

THE COURT: I fully assume it was the regulated committee that took the initiative in trying to find some

appropriate resolution other than where EPA was leading them.

MR. MYERS: Had they not done so, what were the documents saying by EPA -- saying, If you don't do it as you want to with Ecology, you're going to do it with us.

THE COURT: Then EPA could have started this process and been here in a cost recovery action.

MR. MYERS: The problem with our position, the position our companies are put into is at the time we had no right to challenge -- there is no pre-enforcement review. When EPA tells you to do something, you do it or you face stipulated penalties at three times the cost. That is unfortunate unfair position our clients were put in.

And at the time what did the wood waste folks do? They said, Regulate us. They didn't say, No, this is wrong. No, this science is wrong. No, you're legally wrong. No, we're going to fight it, it's not right. They said, Fine, we'll do it. Regulate us.

Weyerhaeuser's knowledge of problems, this document from their own files, Weyerhaeuser research and development department, studying intertidal log raft storage impacts in Coos Bay, Oregon, in March of 1979. What did they say? This report says, Significant organic material increases in the substrate from bark or other losses from stored logs. Also depresses the benthic infauna from biological community. Log rafting, log storage causes those problems. It's not just

hauling logs in and out of the water as Weyerhaeuser is claiming.

It says, Neither dissolved oxygen nor hydrogen sulfide were measured, but these parameters are often effected by log storage and benthic wood deposits in areas of porewater circulation just like the Hylebos Waterway.

It goes on further to say, "While part of this shift seems attributable to debris accumulations covering infauna sites, the above authors and Bella also indicate anaerobic decomposition products as hydrogen sulfide from the wood material in the mud depress the infauna." So by 1979 they knew the exact problem that was being dealt with in the 1990s and 2000.

Lastly it says, The hypothesis that chronic toxicity of leachates from bark and wood incorporated into the substrate and their breakdown products can contribute to the different -- to the different -- to the difference appears to have some validity. So Here they're agreeing with these other studies about the effects of wood waste in the marine environment.

And so I guess they're technical legal arguments being made, they're real world arguments, real world science. What is the real world science that motivated the environmental regulators? That was wood waste was a bad thing, had to go.

THE COURT: Well, it doesn't have to go because

they're still operating. I drive by there. There is still lots of log rafts out there. Some are out in the bay where there is deeper, cooler, stronger current, whatever. But, I mean, they're still operating.

MR. MYERS: But the testimony is that if they accumulate a certain amount --

THE COURT: Clean it up.

MR. MYERS: -- it has to go. You have to handle your logs in a certain way so you minimize now the amount of release.

Again, the focus is, What was the real world impact being done? The real world impact was the biological community was being adversely affected by wood waste.

What is EPA's position on wood waste? Their position is hazardous to the environment, contains hazardous substances, it generates and releases hazardous substances and it must be cleaned up under CERCLA.

Kristin Flint from EPA testified that was not only EPA's policy at the time, it's EPA Region 10's policy now.

What was EPA's directive to the HCC? It was to remediate wood waste. We've gone through this letter. Everyone is tired of reading it. I know I am. The November 3, 1998, letter from Allison Hiltner to Paul Fuglevand, it covers -- covers important points -- I know we've read them before -- that EPA in February of 1996 started this process. It was

EPA starting the process, not Arkema and General Metals, not the HCC. This was EPA's process to declare wood waste a problem.

It says the HCC had to address wood waste in these upcoming reports. It said that EPA considers wood waste areas to be appropriate for cleanup under CERCLA for two reasons: one, mixture with chemicals; other reason is it releases chemicals, it generates chemicals.

And we have the famous Footnote No. 2 that Dr. Floyd testified she believed was true until she testified here on the witness stand. Her testimony before that was consistently, This is true. This is what everyone believed.

And so based on that, EPA -- EPA found that wood does cause environmental problems. It needed to be cleaned up.

And then in this paragraph No. 3, that the cleanup is consistent with the ROD. It's not inconsistent with the ROD. It doesn't require an explanation of significant differences. It's consistent with the ROD. They require that that be done.

Now, what is the impact of EPA's decision on the HCC and the cleanup that was done in the head and neck? The top of this same letter says, The enclosed map shows areas where the Wood Debris Group found wood debris accumulations which will require remediation. Some of these areas are already shown as remediation areas in the HCC's technical memorandum, but

much of it is not currently slated for remediation in the HCC's report. Both the area shown in yellow and gray and the attached map will require remediation.

Now, what were those areas? Again, we've used this colored map, which more clearly shows yellow and gray rather than the black and white map that was attached. It shows sizable areas along the shoreline that had to be added to the cleanup being investigated by the HCC and ultimately performed by Arkema and General Metals.

Now, as Your Honor notes, words matter. Here, this letter and what was written was not written for this lawsuit. It was not written by anyone having a stake in this lawsuit. It states EPA's position then, and according to Kris Flint, EPA's position now. What does it say? "Much of it" -- meaning wood waste -- "Much of it is not currently slated for remediation in the HCC's reports." Then it says, "Areas shown in yellow and gray in the attached will require remediation."

Now, what is Ecology's position on wood waste? Ecology has the same statutory language, regulatory language that is based on, under MTCA, releases or threatened releases of hazardous substances. MTCA defines "hazardous substance" in subpart E as "any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or

the environment if released into the environment."

The MTCA regulations enforce sediment cleanups under the SMS. I have the citation there. The Wood Debris Group did its cleanup under the MTCA statute not under other statutes. It was under the MTCA statute that regulates releases or threatened releases of hazardous substances.

Now, let's talk about the SMS. The testimony has been, and it's obvious from the regulatory language and process, that the SMS is the directors' rule defining deleterious substances as hazardous substances. SMS was enacted under MTCA and Water Pollution Control Act. It defines these other toxic, radioactive, biological, or deleterious substances as meaning various things, including organic debris. Dr. Floyd admitted wood waste is organic debris.

Log storage activities, meaning wood waste generating activities, were known to be part of this definition before the SMS regulations were enacted. Weyerhaeuser claimed that the wood products industry never knew about this and they're flat wrong.

The wood products industry was involved in the sediment advisory group that was formed years before the enactment of the SMS and that participated in all phases of the enactment of the SMS. It was a sediment advisory group that proposed this deleterious substance language. The responsiveness summary before enactment of the SMS specifically referenced

log storage. Weyerhaeuser participated in annual reviews thereafter.

And here, Your Honor, the proof is in the pudding. When it was blatantly obvious to everyone that wood waste was regulated under the SMS and MTCA as a hazardous substance, the wood products industry never objected. When the Michelsen-Kendall paper was presented that specifically referenced wood waste, deleterious substance as being a MTCA -- falling in the definition of a MTCA hazardous substance, the wood products industry never objected. Why didn't they object? Because they already knew it and they had known it for a long time.

So what did wood products companies do? What did the wood waste companies do? I talked about it a little bit previously. They went to Ecology to regulate them to avoid EPA. This wasn't the agency's decision to allocate or to break up the work, it was request of the wood waste companies. Why did they do that? They offered to do wood waste faster. And Ecology agreed because of expediency and because of the assumption that much of the material, if not all the material, would be PSDDA eligible.

So the wood debris companies signed an agreement. They signed an agreed order and consent decree under MTCA, not under other statutes. They cleaned up wood waste as a regulated substance under MTCA. And MTCA, of course, only

regulates hazardous substances as so stated in the statute and in the regulations.

Now, what was Russ McMillan's testimony? I know it was a long time ago. Mr. McMillan is a long-time Ecology sediment specialist. He testified that Weyerhaeuser was named a PLP because of the wood waste, not because of other substances but because of wood waste. He also testified that Ecology named Weyerhaeuser and Ecology named the two other wood waste companies as PLPs in order to get their promised expedited cleanup.

He testified that wood waste is a MTCA hazardous substance because it reduces dissolved oxygen levels, it contains phenolic compounds that leach the sediments, it decays and produces ammonia sulfides, and it can be regulated if it causes adverse biological conditions. And here there certainly were adverse biological conditions.

Mr. McMillan's testimony confirmed that of Dr. Michelsen. He confirmed wood waste is a MTCA hazardous substance, that Ecology agreed to take on the wood waste cleanup for expediency, not as an allocation, but for expediency purposes.

The SMS, she testified, had extensive pre-enactment public review and comment. The sediment advisory group included the wood products industry, that log storage was one of the unique discharges that was discussed and referenced in the

responsiveness summary; that it was recognized that bark accumulations were an environmental problem in log storage areas; that when referring to hazardous substances in the Wood Debris Group documents, Ecology is referring to wood waste; lastly, that deleterious substance is a MTCA hazardous substance.

Then we have as an exhibit, one of the many that I can't remember the exhibit number, which is the Kendall and Michelsen paper that discusses the regulatory approach by the Department of Ecology and the Army Corps in dealing with wood waste in sediments. And it's in this paper where they flat out say wood waste is a MTCA hazardous substance, after which the wood products industry never objected, never objected because they knew that.

Now, agency determinations are given, should be given -- agency determinations of their own regulations are to be given great deference. That is certainly the situation here. Parties are placed under a burden, as you know, Your Honor, when dealing with the agencies. And sometimes their interpretations are fair, sometimes they're unfair. But yet their interpretations, their determinations under their own regulations are to be given great deference and great weight. It's certainly what happened here.

And what were those determinations? By both EPA and Ecology they declared wood waste to be a hazardous substance.

Why did they do so? Because it is.

In fairness, that is what we're seeking is fairness, wood waste drove substantial cleanup costs. From that November 1998 letter there were large areas that now require remediation because of wood waste. Mr. Fuglevand went through very carefully yesterday the data that shows what drove the cleanup of various areas, and the cleanup of big areas was wood waste.

Had EPA not required that wood waste be cleaned up, the Department of Ecology certainly would have. Wood waste also substantially increased the cleanup cost. It limited cleanup options. Low cost options such as capping and natural recovery are not available, were not available in wood waste areas. All you could do is dredge. Once you start dredging you don't stop, you go to the bottom. That is required.

That is what the Wood Debris Group did too. It resulted in a huge volume increase, 80,000 to 100,000 cubic yards, approximately 20 percent of the total dredged. Logs and debris stirred up the sediments forcing re-dredging. This wasn't an unanticipated condition, but it was a condition that had to be dealt with that resulted in more sediment being dredged, more cost being incurred.

Abandoned creosote pile stubs and logs certainly slowed the work, made it less efficient. Logs required special handling at greater cost, and the spikes -- hopefully I'll

get my spike back one of these days -- flattened tires, again, added more costs, all of which put together, wood waste caused not only more to be dredged but cost more money to dredge.

With that, I will gladly pass the time to Mr. McCarthy.

THE COURT: Thank you.

You got some histograms with you?

MR. McCARTHY: I do.

THE COURT: I would be disappointed if you didn't.

MR. McCARTHY: I knew you would.

Your Honor, although Mr. Myers and I work closely together on this, there are many hours in the morning probably where we didn't quite avoid all overlap. I'll try to avoid it. Your Honor's questions got into some of the materials I was going to discuss. I'll try to focus it on what Mr. Myers has not already addressed.

What we're going to start out with now is this third question that this court has to address, plaintiffs believe the Court has to address in order to make its allocation determination in the case.

And that is: What are the sources of wood waste and chemicals to CO-14? We think that the answer to the first question is pretty easy. What is the source of wood waste to CO-14? We think Weyerhaeuser is the sole source of wood waste to CO-14, owned and operated CO-14. Literally no

dispute about that.

More difficult is: What is the source of the chemicals? Let's start with chemicals that experts on both sides have admitted are associated with wood waste.

We believe there is no dispute that wood waste causes releases or threatened releases of hazardous substances. The Court should remember, although there is a dispute among the experts about what the literature says, about what is contained in wood and wood waste, samples taken at this site, data generated by Dr. Boehm on behalf of Weyerhaeuser, found 4-methyl phenol in the wood waste sitting on the TEF yard before it was ever disposed of in the waterway.

The presence of wood waste causes the release of hydrogen sulfide and ammonia to marine sediments. That is undisputed. And the release of hazardous substances is a normal expected consequence of dumping wood waste into the anaerobic sediments of the Hylebos.

Now, there has been lots of debate about the presence of 4-methyl phenol. There has been a lot of debate about the presence of 4-methyl phenol in living wood. However, it's undeniable that Weyerhaeuser's consultants found it in the massive piles of wood waste that accumulated on Weyerhaeuser's property.

There is really no debate that trees themselves produce the substituted phenols which are the 4-methyl phenol

precursors and that the biological and chemical processes that generate 4-methyl phenol from those compounds are present, including the bacteria and the microbes that act on them, they're present in the living trees, and they're also present in the trees after they're cut and sorted on a log sort yard. They're present in both living and dead wood.

The question of whether or not methyl phenols is present in a living tree, however, we believe is somewhat of a red herring. The more relevant question is: Does the dumping of tons of wood waste into the sediments in this anaerobic environment causes the release or threat of release of 4-methyl phenol? because, remember, CERCLA liability is based on the release or threatened release from a facility. As Mr. Myers said, that is what we have here.

THE COURT: You want me to shift the question from whether or not the depositing of the wood into the waterway -- into water, into still water, constitutes a release or threatened release, and you want me to focus on the Weyerhaeuser property as a facility itself that unquestionably has these hazardous substances emitted into the environment?

MR. McCARTHY: Right, Your Honor. We don't want to lose --

THE COURT: We can go back to midway or we can go back to a number of them, what people -- what the regulators

did, from my recollection, is that they had sources that related to Boeing chemicals -- they didn't go to Mr. and Mrs. Smith down the road and said, You've got garbage there so you've got one one-thousandths percent of the -- they look at the chemical known hazardous substances, but the owner of the facility is on the hook for whatever is leaching into the environment.

MR. McCARTHY: That is certainly an alternative basis. We can't lose track of the fact the only testimony of the wood waste found 4-methyl phenol. Dr. Boehm speculated maybe it's coming from Kaiser air emissions. But the air emissions that Dr. Boehm tested on the TEF, he pointed those air samplers, they didn't find any 4-methyl phenol.

THE COURT: I'm not questioning the association of 4-methyl phenol with wood and its decay. That is not the issue with me. The issue is whether or not -- all I answered yesterday in my own mind is wood debris itself does not contain -- wood does not contain a hazardous substance that is released into the environment.

Now, I had questions remaining for today as to whether or not the focus on a shift at some point from release of the wood itself, dropping a piece of bark into water, still water, versus what liability is there that derives from simply owning the facility where this stuff has come to rest and where all this stuff is happening.

MR. McCARTHY: Your Honor, we do want to focus on that issue, but we would like the Court to focus on the evidence that was produced in this trial that when we sampled the wood on Weyerhaeuser's facility -- I'm sorry, when Dr. Boehm sampled the wood on Weyerhaeuser's property he found 4-methyl phenol in the wood at levels up to 1400 parts per billion, which are not insignificant.

Then Dr. Boehm sampled Kaiser Ditch sediments. There is testimony that wood waste got into the sediments through the storm water at similar levels, slightly lower, and then again in the dredge sediments found by the HHCG. Mr. Farlow showed that 4-methyl phenol demonstrated a strong statistical correlation with resin acids, which is a chemical that -- there really is no dispute that is specifically associated with wood. We don't want the Court to lose track of that.

THE COURT: I heard all of that.

MR. McCARTHY: Getting back to the issues about the facility and the release from the facility. Industrial log handling and related generation of wood waste does not naturally occur. Like mining waste, generation of wood waste in an industrial marine log handling operation is an artifical alteration rather than a naturally occurring process or phenomenon, very similar to mining waste discussed in the Iron Mountain case.

It's undisputed that Weyerhaeuser's operations disposed

massive quantities on its own facility. We're not talking about an alfalfa farmer here, Your Honor. This is more akin to a large industrial cattle or pig operation. We're not talking about someone throwing sticks for their dogs in the Hylebos. There is a large operation generating massive quantities of waste.

And we think we can distinguish this from the *Serafini* case, the PVC case. What you have is you're throwing these into an environment -- it's like turning -- throwing it into an industrial chemical facility that manufactures at least ammonia and hydrogen sulfide when you throw the wood in that environment.

I would like to turn to the PAHs issue. Although the chemistry experts agreed on very little in this case, I think they did agree that pyrogenic PAHs were the drivers as far as chemistry was concerned in CO-14 and that there were really only three potentially significant sources and those were Kaiser, Weyerhaeuser TEF and the creosote dock, and storm water.

Plaintiffs have never denied that Kaiser is the predominant source of PAHs throughout the head of the Hylebos. I said that in the opening statement. Your Honor asked me the question when we were going through the histograms, if you'll recall. We've never denied that.

THE COURT: I think Mr. Farlow testified the other

way. He said that creosote was the predominant -- the predominant source of PAHs in the waterway. That was counterintuitive to me.

MR. McCARTHY: In CO-14, that was Mr. Farlow's opinion. We have no contest. They generated wet scrubber sludge from '47 to '74. There is no question that the ponds discharged to the ditch as a primary pathway.

THE COURT: Here is the problem I have with this case and the thing I think makes it so difficult. Everybody is looking for hooks to get wood debris into the calculus. But the real world reality is that PAHs were driving the cleanup, as you've just said. And wood was simply the nuisance. Wood is an enemy because of its volume.

MR. McCARTHY: That's part of the problem, Your Honor.

THE COURT: Its chemistry is so small a part of this problem. It looms large because of its volume, simply by virtue of -- and as Mr. Myers has indicated, junk and everything that goes with it, tires and -- I mean, you know, I sat through the first -- I know the wood debris was a pain in the ass for the dredgers to have to deal with. There is no question. It did drive the cost. But we're talking about -- we're talking about chemistry over here. And if you were -- if you were to put a scale and put chemicals emanating from the wood versus the other things that are the,

quote/unquote, drivers, I mean, it's not a fair fight.

MR. McCARTHY: Your Honor, in CO-14 in particular, because of the biological issues, toxicity associated with wood waste, not only did it drive costs because of volume, but remedial options.

THE COURT: Right. And I should have said that too. It limited your abilities to do a lot of things. But what we're trying to do is apply a scientifically oriented statute to -- we're dealing with a side issue in order to get to what the -- to have an excuse to get to the real issue, which was: Your stuff, Weyerhaeuser, caused us a lot of pain and agony and we think you ought to -- you ought to pay for it.

Reality is that in terms of what I've seen as the evidence and applying this scientifically based statute, we're going to find them liable for chemistry that they didn't create and then look for -- try to translate that into clean up the mess which is yours, which is the wood.

And they're dissociated.

MR. McCARTHY: Well, Your Honor --

THE COURT: I'm not saying it's not going to be the ultimate outcome, it's just that --

MR. McCARTHY: What is relevant about the chemistry, though, Your Honor, is you have the CO-14 that is owned and operated by Weyerhaeuser. And assuming that Kaiser is the predominant source, Weyerhaeuser is also a source of that

same chemical, the pyrogenic PAHs. And as Mr. Myers said, it's not molecules, it's measurable, you can see it. You can see it in the fingerprints. Whether those are representative samples, whether samples taken during remediation give you an idea of how to quantitatively allocate, perhaps not.

THE COURT: How should the Court evaluate where the piles are themselves? There hasn't been any subsequent dredging after the work was put in. And the solution has apparently been natural recovery. I noticed with interest whenever we were talking about exceedances of SQOs, we were talking about it without a document and without a quantitative comparison to the plume, for example. I took that to mean the SQOs or exceedances are relatively modest. I don't know that. I assume that if they were huge that you would had a moving van move the exhibit in to demonstrate it.

MR. McCARTHY: You bet, Your Honor. We were limited to limited data. You remember when Battelle did their study under the dock they took very, very shallow samples near the shore where you have to believe they were hoping they would get something that looked like storm water. One of those samples --

THE COURT: Regulators bought it, apparently.

MR. MYERS: No.

MR. McCARTHY: Mr. Myers is closer to the regulatory, but if you look at 1700 piling dock, why do the regulators

say not to dredge in that area when you could keep it from being disturbed again? Well, I would --

THE COURT: Marina --

MR. McCARTHY: The marina was not 1700 pilings. And it was a commercial facility, not -- I'm sorry, it was a pleasure boat facility, not a commercial operating log sort yard.

To move 1700 pilings, what do you want to bet happens when Weyerhaeuser ceases operations and that dock has to come down? Will another creosote piling dock go up there? Will there be remediation in the PAHs in the sediments?

But, again, with the sampling we are limited by the data. They went six inches deep. And -- but there was one core there at P 400, which had SQO exceedances. As you went down in depth, they went up. But they only went down a meter when it -- you know, several meters to get down to where you would expect to find the creosote that was deposited there in 1977 during the construction.

THE COURT: But the reality is that the costs we're fighting over here do not include costs related to underneath the Weyerhaeuser dock.

MR. McCARTHY: That's right. They're right next to the dock.

THE COURT: I understand. But in terms of the concentration gradients, wouldn't -- doesn't science suggest

to us that there ought to be a -- the farther away you get from the source, the lower the concentrations and not vice versa?

MR. McCARTHY: I perfectly agree, Your Honor. I'm from Colorado, so most of my cases are groundwater cases. You don't have people disturbing the aquifer. It's 10, 30 feet below. You can see the perfect gradients. You don't have tugboats coming in, you don't have people dredging, you don't have people diluting with tons of wood waste.

So as I think Mr. Dalton testified in this situation, the concentration gradients, although you would like that to be the simple answer, even in the red blob area, Dr. Boehm's red blob, where were the lowest concentrations? They were at the top of Dr. Floyd's hill of Kaiser sediment. Does that make sense?

THE COURT: I was surprised nobody dealt head-on with the peanut until we got to the very end.

MR. McCARTHY: I was hoping Mr. Coldiron would bring up Dr. Floyd's figure and he didn't.

We talked about Kaiser. Maybe we can skip through a few of these.

Your Honor, this is the point that has to deal with the orphan sharing and equity. You remember that prior to 1960 Kaiser's discharge was to the Middle Turning Basin. And as Kaiser -- it was to the Middle Turning Basin and the

plaintiffs have born 100 percent of those cleanup costs of the Middle Turning Basin.

And after 1960 the discharge changed to that area between CO-14 and CO-13. And as Kaiser is an orphan, the discharges in that area have to be equitably apportioned too. Bearing in mind that the plaintiffs have born the cost of Kaiser's waste discharge other places and the discharge of other orphans at the site.

I think we talked about this. I can go through this, but simply the point here is that Weyerhaeuser is also a -- we believe the significant source -- Your Honor had asked Are there any other creosote sites around? And Mr. Fuglevand testified yesterday that creosote pilings are driving the environmental investigation by the DNR at what just happens to be a former Weyerhaeuser facility in Woodard Bay. So this really isn't an issue just unique to this site.

I'm going to talk briefly about fingerprinting and why it matters in this case. And as I stated a little bit earlier, although the plaintiffs' chemical fingerprinting was based upon sampling that was designed from environmental remediation or environmental investigation and not for forensics, it's the data that we have available. And we can see it limits its usefulness for quantitative allocation, but it does provide useful information in identifying whether a specific source, such as creosoted dock at the TEF, has had

an impact that you can see out there in the sediments.

Your Honor knows what we're doing with fingerprinting. It allows us to compare different patterns to make these identifications. And there are not many histograms. I want to go through this one more time.

The plaintiffs are seeking cost for dredging sediments in CO-14. And here we have -- here we have fingerprints of the three culprits here. We have, first of all, the sediments. This is what we're trying to find out: What releases caused this? Now, we know this is limited sampling, but every sample that we took from the dredge barges -- and, again, it wasn't scientifically designed to be representative, it's just the ones that got samples -- but they were fairly well distributed. Every single one looked like this figure in the upper left-hand corner where you had high fluoranthene to pyrene ratios and you had the ski-slope pattern, as much as Dr. Boehm hates that terminology.

We compare that to weathered creosote from Sooke Basin, which is the lower left-hand histogram. This was a controlled scientific study that was looking at What does creosote look like in a cold marine, still marine sediments? And the Court can make its own comparison.

THE COURT: Again, the histograms and the bi-plots and all of that seem to be aimed at establishing that it's creosote, not wet scrubber sludge out there that is being

remediated. I mean, that's what I think -- what they're doing. And, you know, you're right at the -- everybody -- you have indicated in opening and closing that throughout the waterway, the PAHs, it's wet scrubber sludge. There is lots of it. Where did it come out? It came right out of the Kaiser Ditch in large -- there is also some air emissions, perhaps, but came out --

So you've got -- the predominant source of PAHs is wet scrubber sludge and it comes out the Kaiser Ditch right at CO-14 or right there. And it has -- and it has that plume. Then you've got what you acknowledge to be a lesser component, which is creosote.

MR. McCARTHY: Right.

THE COURT: And I guess I've never understood why anybody is trying to prove it's one and not the other and we don't simply -- again, it's part of humble decision-making. You got one predominant; you've got one lesser. And it seems to me that, you know, this has been a useful exercise for somebody in an academic level, but nothing I saw in this or anywhere else was going to convince me, or apparently you, that creosote was the dominant source --

MR. McCARTHY: What it does show, Your Honor, this is humble lawyering, is that it's there. We -- again, these dredge samples, they were -- someone filled up a bucket.

THE COURT: You're saying notwithstanding what you

would expect from the concentrations gradient, we can establish that creosote did make it in to -- did migrate significantly --

MR. McCARTHY: It had to be more than -- Your Honor, the creosote you would suspect is closer to the dock. But where is the most activity in the Weyerhaeuser facility? It's right at the log haul-out area, which is just west of the dock. So is it surprising that those sediments get stirred up and you find them, like wet scrubber sludge, you find that mixed throughout.

Now, did we get lucky or something? I don't know how they did the sampling. They did it while they were doing remediation. Was it representative? Certainly wasn't scientifically designed to be so, but this is what we find.

And the point that I think that the fingerprinting makes, Your Honor, is simply that it's there. Can you use it for quantitative allocation? That's up to you and I think I know what you think about that, but just want to make the point that it is there and it's not molecules. It's in sufficient quantities. We find it in every sample.

THE COURT: I think at the end of the day it is less than helpful in terms of problem solving.

MR. McCARTHY: Fair enough.

THE COURT: 1700, you don't know -- you may know a little bit about what fate and transport -- is that the term?

-- see how far it got out, but if you're looking at CO-14 as a unit, I mean, I think at the end of the day the evidence is, with or without histograms, that there is PAHs out there. They were a nuisance that caused the dredging to be more costly and that wet scrubber sludge was a more dominant and -- a more dominant influence than creosote, but creosote was definitely present. And -- you know, I don't know what more you can conclude from any of this stuff.

MR. McCARTHY: Fair enough. Fair enough.

Well, I guess, Your Honor, what we can conclude from that is simply that it's there. There are only two parties that are possible sources and one of them is an orphan. So when we're dividing PAHs it's an equitable decision.

THE COURT: Right, and the argument is they bought property, it was contaminated with PAHs from wet scrubber sludge and plus they've got creosote, and at least as we're looking at CO-14, it's theirs. I assume that is the argument.

Now, they're going to have a different argument that the family ought not be broken up and the chemical family started out, probably created the need for a Superfund site and we ought to keep that family together. And for good or for ill, Kaiser was part of the chemical group's family.

MR. McCARTHY: Thank goodness we live in America where the father doesn't decide or the government doesn't

decide who you marry.

THE COURT: We don't live in a society that keeps families together that well either.

MR. McCARTHY: That's too bad.

Your Honor, I will skip through the last histogram and I want to talk about -- we talked about plaintiffs' fingerprinting. For a moment I want to talk about Weyerhaeuser's fingerprinting.

Admittedly, plaintiffs' experts relied upon the existing data that was generated, not for forensic purposes, for remediation. Weyerhaeuser, however, specifically commissioned a forensic study that was part of a $2 million study to generate new data specifically for the purpose of identifying sources, or should I say a source.

The Battelle study conducted in 1999 to 2000 was intended for adversarial proceeding. It was not for remedial investigation or research. And as part of that, Weyerhaeuser chose to sample storm water impacted sediments in the Kaiser Ditch to drive its fingerprint for wet scrubber sludge, and then it chose to sample hydraulic fluid to fingerprint its own site, in which I believe Dr. Boehm stated hydraulic fluid readily degrades in the environment, so it was probably not expected to be found in the sediments.

What is interesting -- as interesting as what Weyerhaeuser chose to sample to set up its fingerprinting exercise, it's

just as interesting to see what they chose not to sample. They didn't sample any wet scrubber sludge from the ponds, never even asked if they could do it. They chose not to review Ecology files that had sampling data from the wet scrubber sludge ponds that would enable them to establish a fingerprint.

As I've discussed earlier, they chose not to sample the deeper sediments, particularly under the dock. And we believe that if that had done we would have had much clearer picture on what was going on as far as contamination sources.

Similarly, Weyerhaeuser did not sample the obvious TEF sources of PAHs from other sources, the storm water catch basins and the oil water separator sludge. If you'll remember, Mr. Wrecker and Mr. Shields, when they did their analysis of other potential sources, one of the -- they -- especially Mr. Shields, he talked at great length. That is what you look at. When you're -- outside of litigation context, when these environmental consultants do a site evaluation, that is one of the first things they look at, catch water basins. You get the signatures of all the chemicals that are being used on the site spilled on the site.

But there is really no mystery why Weyerhaeuser avoided these obvious places. It's because the $2 million study was technical advocacy and not objective science.

KD-100, we all know where it is. I told you this was the last histogram so I will skip this one. But KD-100, again, it's a storm water source, a storm water signature. And I guess the presentation to EPA when they presented the Battelle study was Oh, look, we'll call this wet scrubber sludge which is in the shallow sediments storm water and let's follow the breadcrumb trail. Suffice to say, you find the same signature in the shallow sediments everywhere.

I'll conclude on fingerprinting restating the obvious. There is really no dispute Kaiser is a large source, but the Weyerhaeuser's choices of what to sample and what not to sample was designed to minimize its PAH contributions to the water and to maximize Kaiser's. And I think that Weyerhaeuser's fingerprinting demonstrates a more complete study would probably show that while it's not the sole source or the predominant source, it certainly is a significant source in this area of CO-14.

THE COURT: Why don't we take our midmorning break now. Court will be in recess for 15 minutes.

(Court in recess.)

THE COURT: Please be seated.

Mr. McCarthy, you may continue.

MR. McCARTHY: We had a few more histograms, but I think we'll move on to the fourth question. And Question 4, which is really why we're all here, is: What is the

appropriate allocation? And I'll be sharing a discussion of this topic with Mr. Myers, but I'm going to start it off with plaintiffs.

The Court has already decided that Weyerhaeuser is a liable party. And as everyone here knows, the Court has broad discretion to equitably allocate the cost. The question here is: What is the fair and equitable share that Weyerhaeuser should bear given that the plaintiffs have already born 100 percent of the costs thus far?

When we started out this case six weeks ago we put up the slide, equity equals fairness. And what we want to look at are the views that the various parties have taken on what is fair.

Weyerhaeuser's definition of fairness is -- today is similar to what it was six weeks ago: It pays nothing for the cleanup of its own property, CO-14; it's responsible for the wood fibers only, not the surrounding sediments that have to be removed to dredge and remediate those wood fibers; nothing for any of the orphans: Kaiser, Asarco, Tacoma Boat; Arkema and General Metals gets to pay 10 percent of the cost of cleaning up CO-14, even though Arkema and General Metals were not sources of wood waste or PAHs that drove the cleanup; and Weyerhaeuser gets contribution protection under MTCA for the wood waste cleanup even though it claims that wood waste is not a MTCA hazardous substance.

Not only does Weyerhaeuser pay nothing, Weyerhaeuser claims an offset in this case for investigating its own wood waste problem, for cleaning up wood waste in front of its own dock that was long designated for anticipated maintenance dredging. As part of Weyerhaeuser's view of the world, plaintiffs also get to pay for Dr. Boehm's fees for blaming Kaiser in the private allocation dispute. And plaintiffs also get to pay for the costs that Weyerhaeuser incurred disposing of some PAH contaminated sediments in front of its 1700 creosote piling dock.

If we compare Weyerhaeuser's version to that of the plaintiffs of what fairness would be in this case, we propose that we allocate to Weyerhaeuser only a share of the net costs, which as we stated before, that equals project cost through the first season, dredging season, of 2004, not the 2005 costs, less the settlements received. Weyerhaeuser should be responsible for the cost of cleaning up its own property and its log pen.

Arkema and General Metals have already paid a sizable unfunded orphan share outside of CO-14. We believe the Weyerhaeuser should pay the unfunded orphan share inside. CO-14 was its exclusive area of operations.

Weyerhaeuser should be responsible for the costs on adjacent properties it impacted through its log rafting operations in CO-12 and 13. Weyerhaeuser should not get an

offset for investigating and cleaning up its own wood waste problems or for the private allocation dispute with Kaiser.

And finally, we believe that Weyerhaeuser should pay its fair share of future site-related costs based on the proportion of it the Court decides is fair for the past costs here.

THE COURT: What do you mean by "site-related costs"? Is that just any cost related to CO-12, CO-13, CO-14 in the same proportion that the Court --

MR. McCARTHY: No. We believe if you decide, as we propose, that 18.94 percent is their fair share of the cost, if we have to do additional activities OM, et cetera, that's their share. We decide that right now. What is their fair share in terms of a percentage and apply that forward.

THE COURT: Okay.

MR. McCARTHY: Now, in deciding what a fair share is the courts normally -- after they recite the Gore factors, they typically --

THE COURT: They ignore them, but you got to cite them first.

MR. McCARTHY: Even though they're not statute and Congress decided not to put them in the statute.

THE COURT: They did invent the Internet, after all.

MR. McCARTHY: You look at -- what were the remedy drivers? Who benefitted from the cleanup? We think it's

important here to note that Weyerhaeuser and the Wood Debris Group determined the areas that the HHCG were going to have to dredge. Remember, they handed that map to EPA. EPA handed it to us.

Looking a little more detail at the specific factors, EPA identified both the plaintiffs and Weyerhaeuser as PRPs at this site. The plaintiffs cooperated, conducted cleanup, conducted all the investigations, have chased all the parties that didn't participate.

Weyerhaeuser, on the other hand, declined to participate in the CERCLA action. And although you really can't avoid them -- you can't -- you can't criticize them for trying to avoid the CERCLA mess, they really have to sleep in the bed that they made in allocation for making that decision to avoid all these costs. That has to be a consideration.

They made special efforts to avoid the CERCLA allocation cost or, you know, the process, which is, Your Honor, as the private attorney, I take it you've been involved in it, it's more than the cost that we can quantify here. It's more than the invoices. It's Mr. Cusma's time. Mr. Lotsen has been on the case since the '80s. They have avoided all that and that was their choice, but they should be held to account for that in allocation.

It should also be remembered that although EPA didn't pursue Weyerhaeuser because it had deep pockets that could do

the cleanup, that is what happens in my experience in CERCLA because they expect us to go chase them.

We probably said this too often, but not often enough for us or our clients, we paid 100 percent of the costs here. In CO-14, Weyerhaeuser's received 100 percent of the benefit and paid nothing.

It's undisputed, or should be undisputed, that wood waste in PAHs were the CO-14 remedy drivers. And for those two remedy drivers Weyerhaeuser is the last man standing and they were the remedy drivers on its own property.

The evidence has also shown that Weyerhaeuser released wood waste in CO-12, CO-13. The operations on the Dunlap property went from approximately 1966 to 1986, 20 years. Weyerhaeuser began their operations as soon as Dunlap stopped operating there, which is 21 years. There is some impact and we think they should bear responsibility for the wood waste we removed in those areas.

Kaiser orphan share, how do we equitably apportion the Kaiser orphan share? Plaintiffs' proposal is based on the fact that we cleaned up all orphan shares in the head of the Hylebos, including Kaiser's. They weren't just in CO-14. We recall Kaiser was discharging to the Middle Turning Basin for at least 13 years before the waterway was extended. Whatever PAHs were left when we got around to the cleanup, 2004, we cleaned that up. And we got no help from anyone else other

than those who settled through EPA or settling out of this lawsuit.

Weyerhaeuser was the sole beneficiary of plaintiffs' cleanup of Kaiser's orphan share in Weyerhaeuser's property.

Now, the Court has noted that the parties should be held to their agreements. You've said that several times. When we agreed to conduct this cleanup, we did not agree to act as Kaiser's indemnitor for Weyerhaeuser's benefit. We're not part of the same team. Our operations are responsible for different types of chemicals in different areas.

THE COURT: Here -- just to sort of lay out some of the options available to the Court. Maybe these are things Mr. Myers is going to touch upon. For example, I think Mr. Fuglevand made the point that Weyerhaeuser ought to be responsible for all the wood because they're the last wood debris group standing.

The Court could say Weyerhaeuser cleaned up the wood -- create a mythical world and say all that is out there is wood and assume that it would have had to have been cleaned up on the same basis that the other Wood Debris Group areas were cleaned up, how much would that have cost, write a check, and have a nice life, in which case, the same analysis applies to the chemical groups saying you're the last two chemical companies standing and you're responsible for Kaiser. That is one approach that could be taken.

The other approach could be that, Look, you've got creosote, you've bought contaminated property that has got wet scrubber sludge, there is -- seems to be a symmetry here that CO-14 is most affected by both of those things. You get the total cost of cleaning up CO-14, because you benefit from having the clean area in front of your property, and oh, by the way, you get the deduction from that, a portion of the total settlements that were made also. That's an approach that could be taken.

So, I mean -- when I say that plaintiffs, you know, stick to your agreements, I'm aware of -- that neither side bought in to Kaiser having any -- taking responsibility for Kaiser's -- for Kaiser's property. But, you know, those are the -- I've got a number of options that I sort of tried to figure out in terms of what would be a fair allocation of responsibility. But that's what I'm -- that's what I'm --

MR. McCARTHY: We understand that, Your Honor. And believe me, on our side we thought: What is a fair way to do this? And we came up with the proposal that we thought of the most fair. Is it the only way to divide up this pie? By no means.

THE COURT: The problem that I have is the plaintiffs' approach is that -- and Mr. Fuglevand is very, very good at staying on message, I think, at least from a bottom dollar standpoint -- and that is that we keep coming

back to basically a percentage that is roughly the cost of removing all of the wood in the neck area. And, you know, that doesn't seem -- that doesn't seem entirely fair to Weyerhaeuser either.

MR. McCARTHY: Your Honor, I guess the way I look at it is I don't quite see the mythical world where Weyerhaeuser isn't a chemical contributor to CO-14. And maybe that's my staying on message. I don't know. I just don't see that. I don't see the evidence pointing to that.

And I think you start with CO-14 when you're talking about dividing orphan shares -- if you're going to divide orphan shares you would have to go, What is the total orphan share? You don't have us share in their orphan shares and they don't share in ours. We cleaned up the orphans through the entire waterway. And under CERCLA, under Pinal Creek, even though it's several liability, you share in all the orphans.

The Court can decide what is a fair way to do this. If you're going to divide CO-14 you say, Well, we should share part of the chemical share for CO-14, we believe under Pinal Creek that they have to share in the orphans beyond Kaiser that we've been cleaning up. We thought for simplicity to deal with the orphan issues is let them take care of the orphans on their property and have them share in the wood.

THE COURT: All right. I hear you.

MR. McCARTHY: With Kaiser an important

consideration -- there is a dispute about it being an orphan, but it bears repeating that they are in bankruptcy. And as far as we know, as of today, as of 11:00 Pacific time, we haven't received a penny.

Although not directly part of the equitable consideration, I want to talk a little bit about contribution protection under MTCA.

Your Honor has made his preliminary thoughts on this issue clear. I would like to focus your attention to evidence that was produced for the first time last Thursday, that 1999 draft of the consent decree that was drafted -- or -- either by Weyerhaeuser or through -- came through Weyerhaeuser's legal department, but the draft that the Wood Debris Group presented to Ecology as their idea of contribution protection.

And Weyerhaeuser specifically sought broad contribution in the consent decree. And that was to cover all the areas where wood had been deposited in the waterway. They didn't seek contribution protection for an area-wide release for everything. They were looking for contribution protection in those areas where wood had been deposited.

Where has wood been deposited in the waterway that required cleanup? The Upper Turning Basin and the neck. Weyerhaeuser was aware we were cleaning up the their wood debris in the neck and they were trying to get contribution

protection from the parties who were cleaning up wood debris or parties who were cleaning up areas where wood had been deposited. That was us.

They sent that proposal to Ecology. And what did Ecology do? Let's look at that. I'm sorry, I didn't have time last night -- I don't know how to blow it up. If we look at the language, Your Honor, the key language is Matters Addressed. They tried to put into specific definition that applied to contribution protection.

And it was, "Matters addressed in this decree shall include all claims based on past and future remedial action costs incurred by Ecology or any other entity in connection with wood debris deposition in the Hylebos Waterway." They weren't seeking area-wide release, they were trying to get contribution protection against us.

And what did Ecology do? They crossed it out.

What was the compromise that Ecology suggested? We are not going to dump on the HHCG, or the HCC at that time. We were not going to cut off third-party rights who are not part of this agreement. But here is what we'll do for you. Although you're only cleaning up wood waste in the Upper Turning Basin, we'll give you a covenant not to sue. The State will not come after you for any matters related to sediments for chemical contamination at levels exceeding values set forth in --

THE COURT: So your interpretation is that the parties intended that matters addressed would have two completely different meanings in two successive paragraphs?

MR. McCARTHY: Yes, because they deal with two separate issues. You have one issue that is affecting third-party rights, people who are not part of this process --

THE COURT: Matters addressed remains undefined in contribution protection and it is specifically defined in covenant not to sue, and they're totally and mutually exclusive.

MR. McCARTHY: Yes. Your Honor, they crossed it out. How difficult would --

THE COURT: No question. They could have solved this problem very easily if they want to. Harken back -- it's consistent with secret memos, Let's do what we need to do to get everybody in so that we can get this cleaned up. If we rely on ambiguity and maintain deniability, then who cares? Curious process that is followed.

MR. McCARTHY: Your Honor, where Ecology put the period, this is the model language, this is the language of the statute. They didn't want to change it. They said, No, but here is what we'll do for you. We're not going to burden third party, you have to deal with that, but what we'll give you is a broader release from the State than just the work

that you did.

One more issue on this, Your Honor, this is all about the intent of the parties. And Greg Jacoby on the stand admitted that the Wood Debris Group's intent after they tried that sally to get contribution protection against people cleaning up other areas where there was wood debris, Mr. Jacoby said his position never changed. That is what he wanted and that is what he thought the agreement meant.

After sending the 1999 proposed language to Ecology and having Ecology reject it, he testified he never again told them that this was their intent. The only expressed intent by either party is that draft 1990 consent decree. That was a proposal by the Wood Debris Group that was rejected.

THE COURT: You think Mr. Jacoby misapprehended the significance of that language and came forward with -- handed you the argument that proves your point? So he didn't understand it?

MR. McCARTHY: When we received that at, I think it was 10:32, that's what an e-mail said. Last Wednesday night when we thought Mr. Jacoby was going to testify Thursday, we received that at 10:32 and surprise, surprise, we were all up. When we read that there were some high fives going around.

But to close on this issue, we do not feel there is any evidence in the record of any express intent by the parties

to have the contribution protection extend to the work that the plaintiffs performed in this case.

And with that, I would like to pass the closing of the closing to Mr. Myers. Thank you.

MR. MYERS: One last point on the contribution protection issue. What Mr. McCarthy is talking about is also directly consistent with the testimony of Russ McMillan who said that it was never his intent as the negotiator for Ecology to provide the Wood Debris Group with this broad release --

THE COURT: And the reason for my questions is I'm not sure DOE had a dog in the fight. I'm not sure they cared whether -- it's one thing if Arkema and General Metals were going to negotiate things. You would expect when somebody makes a proposal that's unacceptable, somebody else to flinch and that's the way you get things done. I have a hard time -- if it were not for case law that said you can't necessarily take a definition from the covenant not to sue and apply it to contribution protection, standard rules of contract instruction would say matters addressed in one -- defined in one area apply to other unless it's specifically altered. There is no -- you know, and so -- I'm not sure these negotiators were aware of that quirk in the law.

MR. McCARTHY: I think, Your Honor, these negotiators were aware that the Wood Debris Group in the -- when they

negotiated in 2001 the Wood Debris Group had handed us that map that said, You have to clean up these areas. Everybody was aware of that.

And I think that although -- with rules of construction I agree with Your Honor. But here I think at the very least this is an ambiguous phrase. Then you look outside the contract, what was proposed and what was rejected and what was agreed to.

THE COURT: Okay.

MR. MYERS: What was testified to by Mister --

THE COURT: That's one -- but I mean, he needed some help too. I mean, he traveled in the wilderness for a little while. And that's not a criticism of him. I'm sure he's been involved in a lot of these and there has been a lot of water under the bridge. This is difficult to remember. But he needed some help.

MR. MYERS: True. But on that issue he said it was never his intent -- it was never the DOE's intent to provide the broad contribution protection that Weyerhaeuser is claiming in this case.

And if Your Honor finds that there is an ambiguity it has to be construed against the drafters of the document should be to the detriment of Arkema and General Metals.

With that, I'll get back on topic.

Certainly through six weeks of trial, as lawyers we get

mired in the trees. We get mired in the details. We get mired in the nitty-gritty of back and forth. When doing equity and fairness, when doing rough justice, it's appropriate to look from the 40,000-foot level, or here the $40-million level. And that is what I would like to do.

What is fair? What is fair is determined by the circumstances. The joy of reading CERCLA cases over the years is that you can find a case that stands for almost any proposition, and most opposing propositions because the circumstances of each case is unique and so the equities and the fairness are unique.

And here, you know, what is fair? What is unique? When regulatory decisions were made by EPA and Ecology, when cleanup work was done, when millions of dollars were spent, everyone believed the same thing. They believed wood waste was bad for the marine environment. They believed wood waste contained and released phenols and methyl phenol that gave the regulatory agencies a direct hook to regulate that.

It generated and released ammonia and hydrogen sulfide giving them another hook as well as a biological hook to regulate it. Weyerhaeuser's arguments in 2007 had no impact on the decisions made to clean up and the tremendous cost incurred from 1998 to 2005. And it's not fair for Weyerhaeuser to get the benefit now of some new scientific or legal argument that it never raised back then. It laid in

the weeds rather than standing in sunshine.

THE COURT: But doesn't the Court have to make a decision, especially on an issue with -- as profound a consequences as I think declaring wood debris to be a CERCLA hazardous substance, doesn't the Court have an obligation to the best of its ability to get it right?

MR. MYERS: I absolutely do, Your Honor.

THE COURT: This is not an estoppel argument that Louisiana Pacific in Georgia now is going to have to pay the price for some nitwit in Washington who said, I don't believe wood debris has any, contains any hazardous substances, but when the decisions were being made these people did think that was the case. So I'm going to follow the they-made-their-bed-let-them-lie-in-it approach.

MR. MYERS: Your Honor, we think you get it right if you rule that because this waste is placed under certain conditions on their property it generates and releases hazardous substances to the environment, that is a release of a hazardous substance from its facility that Arkema and General Metals spend millions of dollars to address.

Continuing on. There is no logical reason for Arkema and General Metals to pay to clean up Weyerhaeuser's property. Arkema and General Metals cleaned up not only their own property but all the other properties in that area. Arkema and General Metals paid the orphan share, as Mr. McCarthy

noted, everywhere. Arkema and General Metals complied with EPA's wood waste directive, 100,000 or so cubic yards, even though neither was a wood waste party.

Let's look at the project cost. I'll blast through these quickly so we have a little time for rebuttal. You heard Mr. Ross, you heard the work that he did. The legal standard for project cost is, quote/unquote, accurate accounting. He looked at all the -- he determined that the costs were incurred under the AOC and the consent decree. He verified assessment payments made by the companies. He verified invoice payments to the contractor by the HCC and PCW. He reviewed the oldest software used by the HCC from days gone by and verified invoices from the fourth largest vendors. He did an accurate accounting. That's not been disputed.

What did he come up with for Arkema and General Metals? Their costs through the first season of dredging were over $48 million. That's how much these two companies spent, $48 million. For that they've received less than 10 million in settlements from various parties. Major ones are bankrupt.

Legal support, this is -- CERCLA is not just a consultant-driven process, it's also a legal-driven process, as you're well aware. Substantial legal fees over the ten years to go through the different -- the AOC and the different work schedules and the cleanup.

There were questions of Mr. Ross about legal invoices.

It's curious when Mr. Cusma testified, the client, the person with knowledge of the work being done who reviewed the invoices, how many questions did Weyerhaeuser ask him about those invoices? Zero. I should add that to the zero column on my chart.

All these -- his testimony was from his review of the invoices. It related to moving the project forward, getting work done under the consent decree and the AOC. They were tied to doing work in the remediation.

Are there some errors in there? I had the pleasure of admitting to two in the Bean case totalling 1.2 hours, I think, out of $100,000 in legal fees.

So the bottom line is the net cost incurred by the clients, the plaintiffs, over $41 million they've spent to clean up this entire mess.

Now the allocation to Weyerhaeuser, we propose 100 percent of CO-14 goes to Weyerhaeuser because it's the long-time property owner, long-time facility operator. It purchased the property already contaminated by Kaiser, used the property for over 30 years, dumped thousands of tons of wood waste. Both Dr. Floyd and Mr. Fuglevand agreed 100 percent of that is Weyerhaeuser's responsibility. It was required to be cleaned up because of high wood waste and PAHs, not just PAHs. This isn't just chemistry, Your Honor. This is biological effect from wood that drove the cleanup.

Arkema and General Metals were not a source of either. The other PAH source is bankrupt, Kaiser. There is no evidence that this high wood waste would have qualified for PSDDA open water disposal. In fact, for the dredge management units that Weyerhaeuser dredged closest to CO-14, all four of those failed the PSDDA testing, but only one of those had any chemical exceedances.

We've got the cost that Mr. Fuglevand tabulated if looking at, What was the actual cost to dredge these different areas, CO-12, 13, 14? $4.6 million just to dredge CO-14 itself for the reasons I stated earlier. He allocated based on contributions doing 50 percent for CO-13, 50 percent between net wood and net chemical contributions; CO-12, 25 percent for the wet wood, 75 percent for the chemical contributions to come up with his percentage, which he multiplied by 41-million-dollar figure to come up with $7.792 million for impacts on all three properties.

The results of the plaintiffs' allocation, as I've written here, Arkema and General Metals are three properties remaining are a combined 81 -- over 81 percent. Weyerhaeuser is 18.94 percent. This allocation accounts for net -- actual net cleanup costs, accounts for the last man standing. Weyerhaeuser could have settled before Kaiser and Asarco went bankrupt. They didn't do so. All the settlements that predated that have no bearing on what we're doing here. This

also accounts for the huge orphan share that is the elephant standing in the courtroom that everybody does see.

Visually if you look at what the allocation is, it shows that in CO-14 Weyerhaeuser gets responsibility of that -- for that. They get half of the net cost in CO-13, quarter of the cost in CO-12. Everything else is Arkema and General Metals. All those other net costs are paid by Arkema and General Metals. You can see there are large areas where they had no involvement whatsoever.

I'll go through a couple things on this slide. If there is no rational basis for divisibility, the Ninth Circuit said you allocate pro rata, one-third, one-third, one-third. Here we've tried to present an option to that pro rata that seemed to make more sense. It focuses on who did what to whom, who should pay for what.

You can look at property operations on a geographic basis. That doesn't seem logical. You could try to determine who were the various sources of different things, but there is not the data to do so. That is a hopeless exercise, Your Honor, we think, anyway.

And lastly, you have to take into account, again, the elephant in the room. These large orphan shares that are not only Kaiser, but they're also Asarco and these other parties.

You've seen the map before showing the blue areas that were designated because of wood waste. You asked for cost to

dredge that are associated with wood removal, wood waste removal. We've given you those costs looking at both PSDDA and landfill disposal. Undoubtedly material would have gone to both. Mr. Fuglevand took 50 percent of the Dunlap settlements and deducted that from the wood total to come up with the 7-million-dollar cost figure, $7 million that does not include Weyerhaeuser's chemical contribution. It does not include orphan shares, and it does not include all the CERCLA transactional costs that the companies have had to pay to get to the process of cleaning up.

Weyerhaeuser's allocation, on the flip side, is wood fibers only. It's a claim that it's paid enough because it dredged in front of its own dock and that it spent $2 million blaming Kaiser.

To go through Dr. Floyd's testimony, she was a key witness for Weyerhaeuser. Again, the flaws in her testimony are number one, she focused on wood fiber only and ignored everything else even though she admitted it's impossible to remove wood fiber. She doesn't assign Weyerhaeuser any liability for chemical even though she admitted PAHs and hydrogen sulfide were from Weyerhaeuser's property. She constantly changed her opinions as to wood fiber volume. One day it's 13,000, next time it's 7000 to 8800, then it's 5500, then it's 5000. Pretty soon we'll be adding wood waste in.

She changed her opinions on whether log rafts generate

waste. At first it was 5 percent in CO-14, now it's nothing. She changed her opinion on whether Weyerhaeuser was liable in CO-9 and 13. Between her export reports and testimony her opinions have turned 180 degrees.

She misuses bathymetry data to come up with estimates of releases and volumes that are completely erroneous and inappropriate. She, in fact, claimed that one to two feet of Kaiser sludge remained in the waterway in the navigation channel following the Army Corps dredging in 1972 when, in fact, the Army Corps dredged below that -- dredged below the 1969 line, several feet below the 1969 mud line that predated any of those releases.

Her testimony -- in her testimony she claimed EPA and Ecology met or did one thing when the EPA and Ecology witnesses testified to the opposite. She claims sediment was resuspended by ships floating by at low tide when the cleanup study report documented the resuspension happened once in a while and was caused by propeller thrust. She failed to assign Weyerhaeuser any portion of the huge orphan share. And lastly, she claimed that chemicals influenced Weyerhaeuser's dock maintenance dredging when the evidence showed chemicals had nothing to do with that. They decided where to dredge well beforehand. The chemicals didn't drive anything.

Lastly, Your Honor, to conclude, we believe Weyerhaeuser

should pay the cost to clean up its own property, to pay the cost to clean up adjacent properties that it impacted. We believe that allocation is fair or at least equally unfair under the circumstances. We believe it's reasonable. We believe it shares the pain.

THE COURT: Thank you very much.

MR. KLEIN: Your Honor, on behalf of Weyerhaeuser Mr. Coldiron and I would like to say that it has been a privilege to present this case to you.

Now, Mr. Coldiron alluded yesterday to the tremendous amount of time, effort, and expense that Weyerhaeuser has gone to in order to defend itself against these claims that creosote was the predominant source of PAHs in CO-14 and that Kaiser wet scrubber sludge wasn't there, which turned out to be a huge issue in preparing the defense of this case and fortunately appears it's been recognized that not be the issue that the plaintiffs tried to make it out to be.

But that's the chief example of extreme attempts the plaintiffs have gone to blame Weyerhaeuser in this case while ignoring that Weyerhaeuser was a performing party in the same geographical area, neck and Upper Turning Basin, which comprises a large part of the plaintiffs' site.

Now, Your Honor, I'm going to present -- we divided this in two parts. I'm going first. I've got a list of the topics that I'm going to present here. I'm not going to read

them to the Court, but basically I'm going to deal with some of the legal issues, including the construction protection and hazardous substance issue and also talk about the cleanup driver and Mr. Fuglevand's allocation.

Then Mr. Coldiron, later, will be talking about some of the more factual issues as well as some of the legal issues. He's going to finish up with a very nice, we think, very cogent explanation or recommendation to the Court about how the allocation should be done in this case.

So let me start with the contribution protection. I wasn't sure how to go about this, Your Honor. I have a presentation with a lot more slides, but I didn't know what the plaintiffs would do. They couldn't let it rest. So I've got to address it briefly.

Let me try and do it this way. I have slides with Russ McMillan testimony on it to remind the Court about a few things. Maybe we'll start first with this slide here, and what we have here addresses that intertidal area exception argument that the plaintiffs were originally making, haven't raised here today, and seem to have decided to drop.

But, you know, when you talk about what matters addressed means, you do look at the definition of "site" in this document. And we originally said site means the whole HWDS except the intertidal areas where the non-Wood Debris Group parties are cleaning up chemically contaminated sediment.

They said, Oh, no, the exception clause modifies site, takes out the neck where we cleaned up chemically contaminated and it doesn't modify intertidal areas.

Then they got the Court to open the issue again with their motion to reconsider, in part by promising that Russ McMillan would come in shed light on this. Here is what Russ McMillan actually said. After we first asked him about the understandings about who was going to do what, then I asked him, "Wasn't it also believed that individual property owners were going to do intertidal cleanups?

"Answer: Yes.

"And that is because they could reach those areas from their upland sites, right?

"Yes."

In other words, he perfectly supported what we had said was the reason for that intertidal area exception. And he agreed that the site at issue for the -- even for the contribution protection is the Upper Turning Basin and the neck. So we frankly can't understand why the plaintiffs still are contesting this issue.

But let's go on to some more of Mr. McMillan's testimony. Mr. McMillan testified about the intent of the parties. And in three different ways he said that the intent was to protect Wood Debris Group against contributions for its own actions. But that makes no sense, as we've argued

previously.

He said that would apply to both characterization and cleanup, but the primary threat at the time the consent decree was entered in to and the negotiations occurred, as people knew, was the HCC and the work that they would be doing in the neck.

And furthermore, Your Honor, I would also like to point out that it's not the intent of Ecology that controls here, it's the intent of the parties. And Mr. McMillan was extremely weak on what Ecology's intent was and it made no sense.

And then, furthermore, we had those -- that attempt by the plaintiffs when they reopened on the motion to reconsider to talk about the four small areas in the Upper Turning Basin and to say that contribution protection is limited to the geographic area, the Upper Turning Basin, because that's where those -- that little bit of work was done.

Well, we asked Russ McMillan about that and he said, just summarizing his answers here, that wasn't even part of the consideration, didn't even play a factor into it.

We've shown through affidavit and response to our motion that -- as well as evidence at the trial that J and G area was intertidal so it is excepted out. Two other areas, which were Puyallup tribe and Port of Tacoma, had no wood debris so there was no threat there. Other areas, small natural

attenuation area at Weyerhaeuser's dock which only had monitoring costs in the future which has now been dredged.

So we get to this document, Your Honor, which is provided by Mr. Jacoby. And we looked at that as cinching the deal. It shows that the Wood Debris Group was asking for contribution protection for the entire waterway and Ecology is coming back and saying no, but they're taking -- what they're doing with matters addressed in the covenant, even though they took it out of the contribution protection, it's saying the same thing. It's saying matters addressed include -- it doesn't say it's all they are, it says it includes all matters related to chemically contaminated sediments which has to be at the site, which has to include the neck as well as the Upper Turning Basin and includes work done by the Wood Debris Group -- excuse me, by the HCC, now HHCG.

And furthermore, when it says in connection with wood debris deposition, the work that the HHCG did was in connection with wood debris deposition. That's why they have a contribution claim.

So, Your Honor, we think it's clear from the document that we do have contribution protection, and hopefully enough said about that.

Now, Your Honor, to kind of gently balance the equation here, where we're constantly being accused of not being a

performing party at this site, let's talk a little bit about, as we tried to do at the start of our case, the plaintiffs' responsibilities.

We know they spent the money. But there does seem to be attempt at trial to minimize their shares here, particularly on the part of General Metals. When I was cross-examining Mr. Fuglevand and we talked about: Is a 30/30/30 split fair among General Metals, Arkema and Kaiser? Mr. Fuglevand is not going there, didn't think about that. But we want the Court to think about that.

Now, it may not be exactly 30/30/30, but if you're talking about rough justice that seems about as good to us as anything else based on evidence. And I'm going to go through that quickly. That leaves 10 percent for Weyerhaeuser and the other parties. You know, it doesn't -- it doesn't remotely approach the 18.94 percent that the plaintiffs have attributed to Weyerhaeuser.

I think what you'll show and what we'll see is that Weyerhaeuser's share is a whole lot less than 10 percent. I don't in any way indicate that we're accepting 10 percent by that example that I'm giving about how to divide up the shares.

But the ROD told us that, of course, Kaiser was a major source of PAHs; that Pennwalt, now Arkema, is a major source of arsenic; that General Metals, in time here it said, was an

ongoing source, I believe is what it says, of PCBs. They were the only party identified in the ROD relating to PCBs. Of course, Weyerhaeuser was not included in here.

Then when we get to the 2000 ESD, we have it confirmed again, Ecology is saying both Dunlap yard and Arkema are sources, General Metals is a source, and Weyerhaeuser is not on there.

Arkema operated on the waterway for many years. Dr. Shields only calculated a loading of arsenic to the waterway from 1965 to 1993, but it was 225,000 pounds.

When you talk about what dwarfs what, surely Arkema's manufacturing facility dwarfs all other sources of arsenic, even the log yards that had Asarco slag, which Weyerhaeuser did not. That 225,000 pounds of arsenic is largely attributable to this pesticide or herbicide named Penite that the Arkema facility manufactured, I think it was starting back in the 1940s.

So all we ask is that the Court not lose sight of the fact that there is a reason that the plaintiffs were the performing parties.

THE COURT: Let me tell you, I understand that historical genesis of all of this. I've jokingly said that our senators were so strong in those days that they thought this was another -- they saw Superfund, they saw the word "fund" and thought, What a great deal for bringing money to

Washington. And Maggie and Scoop just said, Here we are, here we are, and the rest is history. Everybody starts looking at Commencement Bay and here we go. I understand that this -- that is why I made the point yesterday.

I think Weyerhaeuser moved to a Superfund site; they didn't create it. But I think you need to deal with the issue at some point, and I'm sure you will, of the facility and coming up with a -- you know, a loose percentage of the total neck costs and so forth is less appealing to me than trying to look at what is going on in the area. And the facility argument is something that needs to be dealt with. Maybe Mr. Coldiron will deal with it. I'm focussing on CO-14.

MR. KLEIN: We're definitely going to get there. I wanted to stress General Metals a little bit under PCBs, particularly because it leads into my Weyerhaeuser's contribution claim discussion.

Here we see with regard to General Metals -- I guess I should preface this by saying the Court has had some things brought to its attention regarding whether there might be other sources, like Kaiser PCBs, instead of General Metals. There was some questions asked about, What about this five-exceedance factor in front of the Kaiser Ditch when there is a natural attenuation area for PCBs in front of General Metals? And I did want to address that.

Dr. Shields showed with this exhibit an inspection summary, and I'm going to go to the next one which is blown up here. I think it was Mr. McCarthy just a little while ago said that the best evidence of releases and concentrations is in the catch basins. Here you see in the catch basins at General Metals PCB concentrations range from 21,000 to 31,000 parts per billion. That is huge. That dwarfs anything else.

The plaintiffs are trying to make it seem like Kaiser is the source of those PCBs, but the one incident that was anecdotally referred to in 1987, Mr. Recker showed that that was identified quickly, managed, controlled by Kaiser, sampled, and there was no -- there is no real evidence of releases by Kaiser of PCBs to the waterway, but we do have evidence of 162 solid pure pounds of PCBs that go a long way from General Metals. And, of course, this is conservative, Your Honor.

Furthermore, on top of that we were the ones who brought to the Court's attention that the berthing area in front of General Metals' bulkhead, where they claimed natural attenuation shows there is not really that significant of a source of PCBs, was dredged in 1986 and 1988. Before it was dredged it had 4.9 parts per million or 4,900 parts per billion of PCBs. So there were PCBs there.

Yesterday I went through this document with Mr. Fuglevand because it really did seem on his direct rebuttal testimony

that he was trying to also get the Court to believe that PCBs were not an issue in CO-14 either, that they either weren't there or if they were there, they were only there at an exceedance factor below the SRAL, which was a complete red herring we've heard about, so I want to deal with it right now, which is, you know, if we're going to talk what really happened in reality, not just in CO-14, but except for the General Metals' area they didn't attempt to do natural recovery in other areas of the waterway. They had to go through a process to do that. Yes, there was a process, but they didn't use it.

So they keep going back to what they could have done or hypothetically what other areas could have been done with natural recovery because the PCBs were above 300 but less than 450. But they have to make a demonstration that there will be recovery within ten years and get EPA to buy off on that and they never did that. So that is a hollow claim.

THE COURT: Their argument would be because of the bioassay failures, because of wood, it would have done no good to begin that process because the PCBs would have been overshadowed by the bioassay failure. I don't know if it's the argument that would be made.

MR. KLEIN: I think that might have been their argument. The bioassay thing, they didn't do bioassay testing in CO-14. So again, that's a hypothetical. They

didn't do that in what they actually did. Furthermore, if you might be able to do natural recovery on a slope away from the channel, you can't do it in the channel or near the channel with these large ocean-going vessels.

THE COURT: I know and I remember their approach was once and done. So they decided they were going to dredge -- when in doubt dredge. I think was the approach they took.

MR. KLEIN: That had nothing to do with Weyerhaeuser.

Just quickly, yesterday I showed that Mr. Fuglevand had omitted, to make sure the Court did understand, that PCBs were found at depth in CO-14. PCBs were also found throughout the waterway, as we show. And I guess the plaintiffs can claim, Well, those are Kaiser's.

But we think the evidence, the preponderance of evidence, shows those PCBs are General Metals'. And the regulatory agencies didn't do anything to identify Kaiser as a source of PCBs after years and years of study at this site and plenty of opportunity for comment. General Metals is the one that was identified and General Metals is responsible for the PCBs, which leads me to our contribution claim, Your Honor.

What we're talking about here -- is in the yellow area, right there, as the Court knows, what we have put up here is the cost related to Weyerhaeuser dredging that area. There was a PCB hit in there greater than SQOs. It's Weyerhaeuser's position that the only logical explanation for

that is General Metals. There is no credible evidence were they to get back up here and rebuttal and argue that it came from Weyerhaeuser. We didn't have PCB transformers. That is not a valid explanation.

And, you know, Your Honor, I should also maybe comment that when you get to 300 parts per billion PCBs you've got a significant amount there. You know, it's not just trace or as they've said, It's ubiquitous in the waterway. That's not background. That is not what is out there in the environment. Something happened to put that much PCBs there. And it had to come from somewhere.

Mr. Coldiron will talk some more about our evidence about the measured net circulation pattern toward the head. But given what General Metals released in the waterway in their area, how it spread, including into CO-14, it's reasonable to conclude it did move up the waterway and those are General Metals' PCBs.

We've a MTCA counterclaim for the amount that we dredged there. We've revised the exhibit based on -- Dr. Floyd's generously given the plaintiffs a little bit of credit there of 25 percent. So we revised that counterclaim.

This next slide shows -- one you've already seen showing that hit upon which this counterclaim is based.

Next slide summarizes what I've been saying, there was 1350 cubic yards of sediments with PCBs above the SQOs that

we dredged and disposed of and that we believe General Metals is liable for those.

If you recollect that slide I just showed, we had the three red shaded areas that had PAHs exceeding SQOs that Weyerhaeuser dredged. I think it's been made plain here if Weyerhaeuser didn't dredge those areas then the plaintiffs would have had to.

Now, we're not saying they're the plaintiffs' chemicals, but the plaintiffs were required to clean them up or would have been required to clean them up if we didn't. That may be a novel issue under MTCA that the Court needs to decide. But we think that's a valid reason why under MTCA the plaintiffs should be required to absorb those costs.

If the Court believes otherwise, then alternatively we definitely think that Weyerhaeuser should receive credit when you're discussing or thinking about orphan share credit for those PAHs because they were Kaiser wet scrubber sludge. And it's not just in CO-14 that wet scrubber sludge existed. We showed how it moved up -- the Landau report showed how it existed. We showed how it moved up through CO-14. There had to be a reason that Weyerhaeuser had to do all that dredging right after it began operations there and put in the floating walkway. That was the Kaiser wet scrubber sludge delta moving up. We took it out.

We should get some credit on the orphan share calculation

for that. Mr. Coldiron will address that in a little more detail.

So there is my slide. I've already talked to this, Your Honor. Let me go into CO-12 and 13. Because this one really bothers us, Your Honor, that the plaintiffs would be saying that we owe anything for wood in CO-12 or 13. They seem to have completely ignored the Dunlap yards operating for over the half the time we're talking about. I have a series of aerials here that I want to go through. Maybe I'll move over here and keep my voice up to do that.

First one shows a pre-Weyerhaeuser and pre-Dunlap. You still got rafting in the waterway. Next one -- I'm going to go through these very quickly -- shows the same thing. Next one shows the Dunlap yard now starting to operate and still Weyerhaeuser not operating. Next one is showing the logs and the rafting in the waterway in front of the Dunlap yard pre-Weyerhaeuser. Next one moves, I believe, to May 1970, Weyerhaeuser still not in place and Dunlap operating in the waterway. And yet the plaintiffs are just ignoring this evidence that the Dunlap tenants are responsible for wood accumulation in these areas.

The next one is the May 1978 aerial photograph. And here Weyerhaeuser is up and running but so too is the Dunlap yard extremely active. Just as an aside, I would like to point down here near the Wasser Winters yards where you see log

rafting because I have a comment or two to make about Dr. Michelsen, who said, Well, that 1987 log rafting study that didn't show a correlation between 4-methyl phenol and log rafting that Ecology had done, well, that wasn't valid because the samples were taken down at Wasser Winters where they don't log raft.

Well, let's go to some more of these. They sure do seem to be log rafting down in that area now. Again, Weyerhaeuser in operation, Dunlap out of operation. And this area is being used a little bit, but not by very much.

Furthermore, Your Honor, we've showed that CO-13 is distinct from CO-14. Again, Dr. Floyd presented this bathymetry to show the mound in front of CO-14 as you would expect and the similar, perhaps lesser amount in front of the Dunlap yard just as you would expect from the Dunlap yard operations with the gap in between.

And, Your Honor, I know you've expressed some skepticism about the bathymetry, and Mr. Coldiron and I would like to address that. And basically I'm going to show --

THE COURT: I've expressed skepticism at the criticism of the bathymetry because it has been used so extensively by so many parties in two successive cases. I recognize the limitations and not everything is perfect. And that is -- that was the subject of my observation. If bathymetry is as bad as people argue, we sure are using it an

awful lot to make the various arguments on both sides. That was my comment.

MR. KLEIN: Right. And I appreciate that. That ties in to what I was going to say about it is that the experts agree that it's reliable within plus or minus a foot. Dr. Floyd testified how it's frequently used at a variety of other sites to make decisions. We're under water here. We need some evidence. This is as good as it gets along with the camera.

For this purpose it shows us that this -- this was occurring as I just described. I'll comment plaintiffs' experts use bathymetry as I'll be showing in a bit.

I alluded to the cameras. I think Dr. Floyd -- Dr. Floyd talked about how there is really no wood in CO-12. Here you see one camera shots that she showed to that effect, which actually I believe was originally a Striplin interpretation with which Dr. Floyd agreed.

I'm not going to take a lot of time to do this. I never got around to it with Fuglevand. If you look at the barge loading logs, which I believe were Exhibit No. 389, it's a multistep process. I doubt that the Court's really going to be wanting to do that. But if you were to actually look at that for CO-12 and you were to look at these different areas in CO-12, such as H-20 and H-21, and you were to actually go and look and see what the observations are, you would see

things like, you know, November 1, 2004, lane H, negligible wood debris. Same date, lane H further along, negligible wood debris, dredged up log 14 by 40 feet. 11/1/2004, negligible wood debris, one decomposed log. 11/7/2004, negligible wood debris. 11/7/2004, negligible wood debris. I'm not going to keep going on, but there isn't that much wood there.

THE COURT: Let me orient you because what I'm looking at -- I'm not looking at raw percentages of the total. I'm not looking at CO-12 and CO-13. I'm looking at CO-14. And what makes sense for Weyerhaeuser to be responsible for as -- as buying a piece of property -- you know, I outlined the bases of Weyerhaeuser liability. I've tried to express that I don't think you're upland operations contributed very much to chemicals in the waterway. I think that your creosote pilings contributed some, but in relation to wet scrubber sludge it contributed relatively minor amounts of PAH.

And I tried to indicate you bought property that contained an awful -- by, I think, your own testimony, a lot of wet scrubber sludge that came from Kaiser and then was deposited on your property. It seems to me that those are the areas of vulnerability at CO-14 that need to be dealt with.

And the question is: Is it fair to say you pay the total cost of dredging CO-14 and that takes care as a surrogate of

all -- any orphan share anywhere else because you're taking the lion's share of the principal source entry point into the waterway? And that way whatever pilings did or did not contribute you've taken care of. Or is there something other?

I'm really not looking at CO-12, I'm not looking at CO-13, and I'm not looking very carefully, again, in an -- due equity kind of a mode at -- I generally accept the proposition that General Metals was the largest contributor of PCBs to the waterway.

Give you all of that, what do we do about this CO-14 issue which is a significant cost to clean it up?

MR. KLEIN: Okay, Your Honor, let me skip the rest of 12 and 13, then. I'll pass through Mr. Dalton's slide about no accumulation there and my summary slide. Let me go on to the cleanup driver, and I think this will start to get into some of what you're more interested in, at least from the critique aspect. And Mr. Coldiron will look at it more affirmatively.

THE COURT: I'm looking at several liability, Weyerhaeuser ought to pay some fair portion, some fair amount for what it is responsible for, what mess it made and, you know, orphan share, the allocation are -- they say -- the law says what they say, that is, Mr. Myers' argument that that is just shared pain. That's shared unfairness. So that's what

I'm looking at.

MR. KLEIN: Let me deviate from my slide just a little to try and address that some and maybe with CO-14 convey the following way. A lot of what I'm going to do in the next part in talking about the cleanup driver and criticizing Mr. Fuglevand's allocation is to talk about the volume in CO-14 and the layer there. Just keeping it very simple, there is -- there is a layer there. That is what we've been trying to show. It's not perfectly even. It's up and down. It's the 1971, '72 bathymetry line where you've got the Kaiser material below it. And below even the Kaiser material you've got dredging where the plaintiffs went down below the deepest historical dredging.

In those areas there is no wood, it predates Weyerhaeuser's operations. There is one small area that the plaintiffs brought to the Court's attention near our ramp where we dredged and got down lower than the deepest historical. And there was -- Dr. Floyd said there was 500 cubic yards in there. So I'm not talking about that. It's improper for the plaintiffs to act like that -- the way it was there spreads across the entire CO-14.

But there is a layer there, there is 26,000 cubic yards, approximately, below it, according to Floyd, and there is 16,000 cubic yards, something on that order, above it. And Mr. Gross has accepted responsibility for the wood, the

incidental wood, which depends a lot on what we think the cleanup driver is here and how that's understood in that upper layer.

We're saying we don't have a wood responsibility in that lower layer. We understand it's where the Kaiser stuff was. Not all of it was Kaiser; a lot was the plaintiffs dredging down below the deepest historical. If it's put in the orphan share pot, I want to say one thing before I agree to that, we have a slide and an argument that Kaiser is not legally an orphan.

THE COURT: I want to hear that argument.

MR. KLEIN: We think it's a legal issue that needs to be decided. But we understand what you're thinking. In arguing this, we understand there is an orphan share there. We don't think it's fair to dump it all on Weyerhaeuser. And we have reasons for that. And to the extent that Weyerhaeuser is held liable for an orphan share we have these offsets. And Mr. Coldiron will be talking about more about --

THE COURT: It's noon.

MR. KLEIN: -- how that works with actual concrete numbers.

THE COURT: We'll take our recess.

(Court in recess.)

THE COURT: Please be seated.

Mr. Klein, are you ready to go.

MR. KLEIN: I'm ready to go.

Your Honor, next I wanted to talk about the cleanup driver in this case. And there must be a reason why the plaintiffs have so vigorously tried to convince the Court that wood is a cleanup driver. And that is because even if wood isn't a hazardous substance they hope that will give them more than they otherwise would be entitled to get. It would allow them to treat wood as more than incidental to the cleanup.

On that incidental point, Mr. Coldiron has a case he'll show he when he argues that I think you'll find interesting about the concept or remedy driver and what it means in terms of the substances that are not the remedy driver, the incidental to the cleanup.

THE COURT: Is it in connection with the argument of whether or not the substance caused the occurrence of the response costs?

MR. KLEIN: I think that's in there, but I don't think it exclusively depends on that.

THE COURT: Okay.

MR. KLEIN: Anyway, if the Court will recall when we started off with Mr. Fuglevand's testimony I believed that there was an attempt to make it look like Weyerhaeuser's wood went all the way down to the bottom. And, you know, it took

some cross-examining to clarify that, Wait a minute, yeah there is wood at the top, and some places it's 10 to 15 feet thick, we haven't disputed that. But after you get below that, then it drops off, it diminishes.

There may be some wood in there, but certainly not at the criteria that the Wood Debris Group would had have to clean up, not at 15 percent TVS. There may be some isolated wood back from when you saw those log rafts in the waterway or log operations from Dunlap or anyone else before Weyerhaeuser came along. I'm talking about just a little bit here and there or maybe flowed down the Hylebos Creek.

But that layer I talked about earlier was not -- did not contain wood. It's an exclusionary zone for wood. But the plaintiffs were trying to make it seem otherwise. We showed Mr. Dalton's figure to try and correct the record on this. I don't know if I'm up yet.

Okay. I had Mr. Dalton's figure. You can see it. I have his trial testimony.

THE COURT: Page 25?

MR. KLEIN: Yes, Your Honor. It's actually page 16 on my notes.

But Dalton's trial testimony he was asked about Exhibit No. A-549, Station 142.

And the question was: We talked in your deposition that this white area was material that accumulated between 1965

and the 1972 accumulation line, the bathymetry that you showed there, correct?

Answer: That's correct.

Then, if you actually go to the next diagram for Dalton and you see his cross section there, you see that large white area that is under the accumulation from 1972 to 1999. That is what I'm talking about. And that is an area where there really wasn't any wood.

So as the plaintiffs dredge down through that area -- this is a cross section. So we understand it fluctuates to some degree throughout CO-14. As they went down through there through the 1965 line and then they continued five feet beyond that line, they weren't dredging because of wood. And --

THE COURT: Were they dredging because of PAHs?

MR. KLEIN: Yes, and I would also submit based on the exhibits we saw yesterday they were dredging for PCBs or testing for PCBs down that low, but ultimately it was PAHs. Agree with that.

Now, Mr. Dalton said in the follow-on slide, I don't know specifically what is in that white area. I think I said in my deposition I wouldn't be surprised to find wet scrubber sludge PAHs in that area, but we don't have data to show what is specifically in that white area.

We have plenty of data to show what is in there. Both

historical, commonsense, the Landau report, everything else that you've already talked about.

Then my next slide or couple slides are devoted to just recapping what Mr. Recker showed you about the progress as they got down near the bottom and chasing PAHs and how on October 27 of 2004 the last statement regarding wood debris that you see in these weekly progress reports to EPA had been made the week before. On October 27 no mention was made of wood debris cables, et cetera, as a problem. And thereafter wood debris was not mentioned as a problem.

I just realized you turned on the Elmo. I can show my slide there.

To quickly run through it, we showed subsequent reports. I believe this is November 7 talking about the Type 4 sampling being conducted, which was for PAHs. No mention of wood. Then in December 15, again, the Type 4 sampling being conducted, no mention of wood.

And then we go on, Your Honor, to this issue about the ROD, the ESD, the consent decree, statement of work, did they cover wood or not?

And these constant -- this constant use of phrase biology trumps chemistry. First of all, we know that ROD, ESD, and the statement of work don't mention wood. Furthermore, we know that there were opportunities where -- particularly with the 2000 ESD where it could mention wood and wood can be

translated into the SQOs if the agency chose, but it didn't.

We think if the agency had required cleanup of wood through the ROD that at the very least they were obligated to do an ESD like the 2000 ESD was done to change the surface requirements for the HCC to subsurface contamination. That was subsurface chemical contamination.

But EPA did not go through that process. So formally there has never been anything established to make wood a cleanup driver.

THE COURT: Would there have been a process if -- procedurally could -- could -- the ROD was followed by a consent decree or was it? We've got the ROD. We've got the ESD.

MR. KLEIN: The 2000 ESD and the unilateral administrative order in 2002 and the 2004 consent decree for the HHCG, which contained a statement of work.

THE COURT: The question is: Was there a vehicle available to the parties, the affected parties, to go into court at the time of the 1997 or 1998 letter? I guess we're talking about the '98 letter. There wasn't anything filed with a superior court or a federal court by way of a consent decree that needed modification. A new lawsuit would have had to have been initiated saying violation of some sort of administrative procedures act by not having a formal and public hearing to determine whether or not wood should be --

is required to be cleaned up.

MR. KLEIN: I think either that if -- if --

THE COURT: I'm trying to figure --

MR. KLEIN: Right. If they wanted to challenge some supposed directive from EPA to clean up wood, that would have been a vehicle to do it. 2000 ESD would have been another vehicle. They did submit comments. If they were rejected, I think they could have filed suit if they wanted to at that time. It hadn't appropriately been done.

I'm not going to go through these sections in the ROD or the ESD. We've been through them quite a few times. But we've heard biology trumps chemistry over and over again. And we've even now heard the argument that, Oh, biology was -- wood through some biology failures was driving the cleanup in CO-14. I must admit, I'm not sure what is being said there.

Yesterday with Plaintiffs' Exhibit 780 the plaintiffs were showing these biological exceedances here in these two stations, HY 24 and 1143 S, in CO-14. And I pointed out in cross of Mr. Fuglevand, there is only 6.15 percent TVS at Station HY 24. Wood is not causing that biological failure. Furthermore, that failure is the at the surface.

Second of all, this Station 1143, which does have a chemical exceedance, wood is also not causing a problem there, or at least for the plaintiffs to claim that wood is

causing that problem, that is speculation.

Furthermore, these samples are only at the surface. They're during the investigation phase. There is no biological cores, I don't think, in CO-14 during the investigation phase, and there certainly is no biological testing during remediation when the actual work was conducted.

THE COURT: Can we fairly conclude from all that information, however, that something is causing bioassay failures which require clean up, and it is either wood chemistry -- I'm not -- it is either -- the universe of options are wood chemistry, maybe PCBs, and more probably -- and PAHs? I mean --

MR. KLEIN: Or combinations where there is multiple chemicals. I think one of the points is --

THE COURT: But doesn't Weyerhaeuser because of the proximity to its own property have a connection across disciplines, as it were, wood and chemicals?

MR. KLEIN: First of all, the biological tests are not that reliable or that perfect. They're not that good in being able to figure out what the cause is. I think we had testimony from both sides. It's hard to tell the cost.

There were failures in the Upper Turning Basin where there was little wood, which we pointed out. There sometimes has been passes where there is chemistry and no wood. So I'm

really not sure what it tells you.

And as far as us being connected to whatever was happening in CO-14, I guess my point was they weren't testing for biology as they went down, so it couldn't be a driver regardless of what -- you know, if we were able to go back and do it again and see what was going on there, they just weren't using that as a device.

And furthermore, you know, we understand that there was wood there, but there was also chemically contaminated sediment mixed in with that wood. If the Court is going to -- as may have been suggested by one of the questions you asked for more information, if the Court was going to look at that 16,000 cubic yards above the '71, '72 layer and charge Weyerhaeuser for the disposal of that, we would be talking about a benefit to the plaintiffs because that wood, although yes, there's sediment around it, it's chemically contaminated sediment that didn't come from Weyerhaeuser.

You know, as Mr. Coldiron will argue, we're a de minimus chemical party. Maybe there are some trace amounts, minor amounts, molecules based on which you've held us liable, but certainly nothing compared to the magnitude of the Kaiser PAHs and the plaintiffs' PCBs and arsenic that would have been in that layer above 16,000. So they would get a benefit if we were charged for all that.

Now, Your Honor, I'm going to continue a little bit in the

critiquing mode. Like I said, Mr. Coldiron will be more the affirmative side.

I want to address Mr. Fuglevand's allocation. You know, we just don't buy into it at all, as I hope my cross-examination made clear regarding that. We're not going to quibble about too many of the details with it. It just doesn't make a lot of sense to us.

The plaintiffs want Weyerhaeuser to pay for the work in the Middle Turning Basin. They want us to pay for all of Kaiser's share in CO-14. They want us to pay for investigation of the entire waterway, for all the wood in CO-12 and 13. And they're just ignoring us as a Wood Debris Group performing party.

I have a comment about that, Your Honor, because I've looked in the cases and I really haven't seen this kind of a situation. I'm sure there is other sites around the country where there is a federal and state component, but here we have the CERCLA federal site that the plaintiffs are operating under, which is the head of the Hylebos, Upper Turning Basin, Middle Turning Basin, and the neck.

At the same we have this -- I said on the side a handshake, but it's more a formal agreement between EPA and Ecology as to how they're going to treat this area, particularly the neck that we're talking about. And so we have a separate site, the Hylebos wood debris site.

This creates a unique situation when the Court is thinking about who the performing parties are here. We definitely believe that, as I'm showing in this slide, but I think you have a bigger one, it's just showing the two sites, top and bottom together. There is overlap there. There were performing parties at the Wood Debris Group site, Manke, Louisiana Pacific, and Weyerhaeuser, whose property straddles the Upper Turning Basin and portion of the neck.

We think that the fact that there is these two sites and who the performing parties needs to be factored in that and considered in the equitable allocation.

THE COURT: You know, in terms of the Gore factors or whatever, I don't view either party as a recalcitrant party. I don't view Weyerhaeuser as not performing -- I think the contribution of the Wood Debris Group is extensive. Clearly there is a battle going on, sort of a subterranean battle, between chemicals and wood to see who gets stuck with orphan shares and so forth.

As I said earlier -- I can't identify a bad corporate citizen here. That's not going to be a basis for the decision.

MR. KLEIN: We appreciate that, Your Honor.

As I said, Mr. Fuglevand's allocation, it's clearly biased against Weyerhaeuser, made no effort to determine other parties' shares, it shifts investigative costs, shifts the

Kaiser orphan share to us. And one of the things that Mr. Fuglevand said was that, Well, you can't quantify wood volume in CO-14, claims that it couldn't be done because logs and large pieces of wood don't fit into a jar for TVS.

I have a comment about that. First of all, if the Court thinks that that has some merit, then add to whatever the Court decides the cost, a couple truck loads of cost for disposing of the logs that were found. That is what Weyerhaeuser did. You pick the logs up and you -- they're big objects and they're discrete and you manage them separately. If there is a cost, then charge us for that. If there is a cost for spikes and cables, you know, Dr. Floyd said that could amount to a couple cubic yards, we can add that to what we should be charged for.

But TVS is the regulatorily accepted and most used and best understood method for determining the volume of wood. Dr. Floyd was able to use it. In documents that have been public comment noticed and reviewed, EPA and Ecology has signed off on the cleanup study report. Work was done using TVS as a criteria by the Wood Debris Group where we had to clean up. It's definitely a scientific method to determine volume. We've determined volume. We've determined volume two ways with Dr. Floyd, both through the bathymetry calculation and through the plaintiffs' barge loading logs and combined with TVS samples. So it can be done. You asked

us to give you more on that. We gave you more on that. Shy away from that. There is a reason, because it doesn't benefit.

Mr. Fuglevand's allocation contains a variety of conceptual errors. One is this mathematical error that Mr. Dovell pointed out that amounts to $781,000. And it all springs from how you play around with the denominator. I'm not going into it in great detail.

There was another error that Mr. Dovell talked about in connection with this slide. If you add the Bean cost back in, and you're in effect taking credit for those by increasing your bottom line total net cost against Weyerhaeuser, then you need to do something to also account for the extra time that was spent.

And Mr. Dovell explained that you take the 65 days of dredging time and you reduce it by -- if you're staying with the 2004 construction season, you reduce it by an amount that he couldn't quantify because he doesn't have that information. But the plaintiffs didn't do that.

Another way -- I had a little trouble with that conceptually. Another way to look at it, instead of reducing 65, we look at the 227 days and if the -- if the original costs are based on 227 days and then you have the 2005 construction season and you put -- do another -- just for example, another 120 days to do work, you add it to the 227,

you get about 340,350, you make that your denominator. Then your percentage from 10.9 will decrease to something on the order of 7.1.

I could get a calculator and play with these percentages quite a bit and it would have a dramatic effect on the bottom line here. That is another reason why the Fuglevand allocation doesn't work.

Another reason, Your Honor, I guess I don't really need to address this too much anymore, but -- because CO-12 and CO-13 of your remarks earlier, but these were subjective judgments by Mr. Fuglevand, but I will point out when he made those he sure didn't take into account that Arkema was the property owner along that stretch, yet property ownership is used against us in CO-14. Maybe I'll use this time to touch on that again, reserving something for Mr. Coldiron on that.

Just to correct the record, let's make sure it's clear here that in CO-14 we're the property owner for half of it, not the whole thing. It's only out to the pier head, which is half of CO-14. The Port of Tacoma owns the rest.

Do we use some of that area in CO-9? Yes. I'm not saying we didn't use it, but we're not the property owner out beyond here. When the plaintiffs talk about all of CO-14, that cleanup benefitting us, well, that's not really the case.

And furthermore, you know, we just don't see property owner because of our accidental location near Kaiser or our

having bought that property from Kaiser as being a really --

THE COURT: You understand you wouldn't be the first PRP to be stuck with a bill based on the prior owner -- somebody else's activity during prior ownership?

Again, that's one of those distasteful realities afflicting CERCLA enforcement. That is just a fact of life in these kinds of proceedings, any more than it's their responsibility for PAHs if they didn't -- you know, and they're cleaning up a lot of PAHs that they're not responsible for.

So, I mean, perfect justice is not going to be -- is a bridge too far from here, it seems to me.

MR. KLEIN: Okay. I understand that, Your Honor, but I guess our point is at this site we don't think it's that good of a metric to use. You know, Kaiser stuff is a long, a broader area of the waterway than just CO-14. And as example, when I was talking earlier, we cleaned up some of it in front of our dock.

And while we're on the subject of the property ownership -- I was going to do this later under the third-party defenses, but I may as well take it up now since we've been talking about our buying the contaminated property. I know the plaintiffs at the end of yesterday offered Plaintiffs' Exhibit 11, which is the deed.

Now, this is in 1970. The third-party defense says both

for Kaiser air emissions as well as Kaiser wet scrubber sludge that came out and ended up on our property that the release of those hazardous substances doesn't make Weyerhaeuser liable if it's attributable to the act or omission of a third party, which is Kaiser.

Now, there is a exception if there's a contractual relationship, which is why the plaintiffs are showing this deed. I don't know exactly what they're going to argue from it, but anticipating.

Case law, Your Honor, has said that it's more than a contractual relationship. The contact between the land owner and third party somehow has to be connected with the handling of hazardous substances. And a case on that point, which we think is a leading case, is *Westwood Pharmaceuticals*, 965 F.2d 85 (2d Cir. 1992). We don't see this contract as one for the handling of hazardous substances.

I don't know if you've read it yet, but the plaintiffs undoubtedly may point out there is an easement for the Kaiser Ditch. And there is also an interesting provision that is an easement for the unrestricted right to permit air particles to be carried over on our property, such as dust, smoke, et cetera.

What I would like to say with regard to that, Your Honor, is that deed was entered into, that contract, at the time when the parties didn't conduct due diligence under

environmental law like they do now. We can't be held to today's standards for what we did back then. We didn't know wet scrubber sludge was on the property. We didn't know Kaiser air particles contained hazardous substances.

THE COURT: That's the problem -- that's the difficulty I'm talking about with CERCLA. Serendipity becomes a principle of law. That is just the reality of what happens. I think for a variety of reasons that's been necessary, felt necessary for parties to beat up on one another. I view all of you as the good guys. You're neighbors.

And these folks, their clients, were doing God's work in the '20s, according to our ability to know God's work. And you've toiled in these vineyards long enough to know and see a lot of these folks, I was a hero in World War II when I was turning out aluminum for the war effort and now I'm the goat. That's just -- the reality in the world that we live in. Certainly you have to argue against any unjust result affecting your client.

But right now we're not looking for justice. We're trying to avoid our share of injustice being visited upon us. This is much like the old game of hot potato here.

MR. KLEIN: We're giving you our view of the orphan share in kind of --

THE COURT: I appreciate that.

MR. KLEIN: -- in drips and drabs. I keep saying Mr. Coldiron --

THE COURT: He's the good cop; you're the bad cop.

MR. KLEIN: What I want to say, since we're talking about the third-party defense, is that even the plaintiffs haven't argued we were liable by virtue of Kaiser's release of PAHs on our property. We're saying there is -- third-party defense does apply to that as well as the air deposition. When we bought the property we didn't know there were hazardous substances involved. It's not a contract for hazardous substances. And that easement doesn't change anything. It only applies to air, anyway.

So what that means is that 26,000-cubic-yards layer that is underneath -- in CO-14 that is mostly attributable to Kaiser, and the additional part the plaintiffs dredged as they kept going down, if that's to be handled as orphan share, at least Weyerhaeuser doesn't get tagged with it as an equitable factor because of any liability we have for that release. We get involved because you found us liable for CO-14 for the minor amounts, de minimus amounts, that we released.

But since we are a de minimus chemical party and our wood is incidental, then our equitable share of that Kaiser orphan -- well, frankly, our argument is that we don't have an equitable share. To the extent you may think otherwise,

we've done other things like remove Kaiser sludge elsewhere that compensate for that.

If I haven't explained that as well as it could be, the good cop will get it.

THE COURT: Thank God for senior partners.

MR. KLEIN: Another criticism was this double-dipping thing of Mr. Fuglevand. I think that's gone by the wayside given what you have said. The only point was the Dunlap tenants put that wood there, they recover settlements from Dunlap and yet they're still coming after us.

Now we're into the orphan share part of this. And I have my slide here that Kaiser is not legally an orphan. We just wanted to point out that Kaiser was a member of the HCC during an eight-year period, if I got those dates right. They paid one-sixth share of the investigative cost at this site.

And now they actually have settled their liability for $8.9 million. I know that the evidence has been that this is not expected to be funded. They settled their liability with the trustees for $5.5 million, but it's a settlement with the government in which they have contribution protection. And we think because of that and their previous participation that legally they're not an orphan share. The plaintiffs are entitled to 60 percent of this $8.9 million if that money becomes available. We think it further needs to be

considered.

With regard to Asarco, the plaintiffs have each asserted a 66 million claim in the Asarco bankruptcy that we're hearing, apparently, is going to be funded, depending on copper prices. At least at present it appears they'll be funded dollar for dollar. We don't see them as an orphan share.

Even if the Court concludes otherwise -- that is my next slide here about, you know, even if they are orphans -- the Pinal Creek case applies. Under Section 113, "The cost of orphan share is distributed equitably among all PRPs just as cleanup costs are."

So we don't view that as allowing the plaintiffs to make us take the whole thing. They have to take a share of the alleged orphan shares. You know, it's not unfair to make them do that even though they've done work at the rest of the site, or at least in the neck part of it.

You know, while Weyerhaeuser took care of some Kaiser stuff in Upper Turning Basin and so did Manke, if they're 30 percent liable, then they're 30 percent liable of the 30 percent Kaiser orphan share. At some point there is a rough percentage that would apply.

THE COURT: Assume their argument would be, We took care of all the wet scrubber sludge PAHs in 9 and 3 and 8 and 4 and 7 -- you know, and now the Court is looking at just holding Weyerhaeuser responsible for the scrubber sludge in

one little -- not so little segment.

MR. KLEIN: Sure. But the plaintiffs also had chemicals in CO-14 down -- even as we showed, down in the level where the Kaiser PAHs were. So there were PCBs.

THE COURT: And they would say, You also had wood in 13 and 12.

MR. KLEIN: Yep.

THE COURT: I mean, it's been a fair fight. You all have very good arguments as to why you shouldn't be responsible. You know, in a perfect world neither one of you would.

MR. KLEIN: Well, Your Honor, I hate to rely too much on whose burden it is, but it is the plaintiffs' burden to follow Pinal Creek and show an equitable distribution among all PRPs. And they really haven't done that, particularly if you overlap HWDS and performing parties there, including Manke, not just us. They haven't really done that.

THE COURT: Given the standards to establish to do equity, I think that the Court has more than enough information, perhaps too much information, to get -- who knows, maybe the Ninth Circuit will disagree -- has more than enough information to fashion an equitable outcome.

The metals group has come up with their formula. I'm not buying it. Mr. Coldiron's going to come up with a formula or two because perhaps I view the facts and the evidence more

closely to what Weyerhaeuser has been arguing about wood and PAHs and so forth that might be more persuasive.

But it seems to me that Weyerhaeuser has some responsibility for chemicals and has some responsibility for wood and that's why I've sort of abandoned my approach to look at Weyerhaeuser as the last standing wood company, so take care of all the wood in the neck.

And these folks here are the last standing of the chemicals so for good or ill they get Kaiser. I think the data makes it difficult to do that in a perfect way as well.

MR. KLEIN: I think Mr. Coldiron has some numbers that may be helpful. I'll leave it to that.

Then I did have a slide talking about effects of settlements. All I wanted to comment is there is a proportionate approach and a pro tonto approach. Mr. Fuglevand used the pro tonto where the actual amount of settlements was used to reduce total net cost as though that's each party's actual share. I just wanted to remind the Court, I think using the language the Court has followed in approving previous settlements, that, you know, the settlement does not -- the actual dollar amount does not reflect that party's actual equitable share.

THE COURT: Let me make sure we're along -- we're on the same page here. For example, to pick a number, we've got roughly $40 million in total cost, more than 40, there is 48.

But for calculations purposes let's say there is $40 million and there is $10 million of settlements and the cost to clean up CO-14 was $4 million.

Would it be your argument if you're going to -- and please don't do this, Judge, but if you were going to do $4 million to Weyerhaeuser you should take the percentage of the same ratio to which the settlements relate to the total cost and that percentage should be deducted from the 4 million?

MR. KLEIN: Absolutely we would feel that way.

THE COURT: As opposed to taking it off the top and dealing with that number?

MR. KLEIN: We would absolutely.

THE COURT: Do the math and figure out what the percentage of settlements is to the total cost and ascribe that to whatever bill Weyerhaeuser would get.

MR. KLEIN: Right. Wherever you put those settlements and credit them in the model that Mr. Fuglevand had does make a big difference.

THE COURT: Right.

MR. KLEIN: Yes, we would say that.

Very quickly, the allocation by Mr. Fuglevand didn't consider that we really fall in the category of a de minimus chemical party. We didn't consider wood is not a hazardous substance. Our performing party, we dredged Kaiser wet scrubber sludge and that we performed the Battelle Delta

study -- I'll let Mr. Coldiron talk about that. Plaintiffs have said that that was just to protect our own interests. That was used by EPA for its benefit. And we've already talked about the bottom line here.

Let me go on and talk about the alternate allocation that was presented by Mr. Fuglevand yesterday. It clearly didn't follow the Wood Debris Group consent decree criteria. Instead it covered areas which, judging from the Court's remarks, are not in play. So that 100,000-cubic-yard figure that was mentioned today, that's these blue areas that Mr. Fuglevand showed yesterday, he's making Weyerhaeuser 100 percent responsible for those areas, which is totally off base.

He said he didn't attempt to figure the volume in CO-14. He didn't attempt to exclude the 1971 or lower layer, and he tried to make it appear that if there were no chemicals the HHCG would dredge this whole area. I thought that is what he was doing at one point.

Let me move to wood is not a CERCLA hazardous substance. Maybe this very first slide is really important even though we may tend to take it for granted. You know, we know that wood is not listed by EPA as a CERCLA hazardous substance nor by the State. Well, the reason that's significant is that CERCLA has been around since 1978. That hazardous substance list has had things added to it from time to time. EPA knows

how to do that. EPA has been around since before 1978. EPA has never conducted a rule-making for woods. And, you know, we submit there is some awfully good reasons for that and not the least of them being -- we're talking about a decomposition process that gets these chemicals the plaintiffs are talking about, and if that process was to be considered to list wood as a hazardous substance, then of course -- I mean, there is plenty of scenarios as to who that would draw into the net.

But one of them going to plaintiffs' argument regarding landfills is everywhere there is wood buried in a landfill, whether it's from industry, municipality, or from an individual, are we then going to say that they're a potential PRP? That's obviously the kind of problem and the reason as to why EPA hasn't done that.

If I could take --

THE COURT: You're fine. I know you feel burdened by time. You're fine.

MR. KLEIN: If I could make a comment, there is some cathartic value of being able to say this finally. After sitting and listening to all this testimony and the discovery about how those -- the letters from Allison Hiltner and who they were copied to, that that means something, that that establishes an EPA position or that Weyerhaeuser is not filing a lawsuit or writing a letter back to EPA when it

became aware of that '96 issue paper or in '98, you know, us not picking certain actions or at the State, MTCA, SMS triennial reviews, us being present and not objecting to what was being conveyed, as if that's relevant, if that means something.

Does that mean that if we had objected that that would mean we win? I think not.

Am I allowed to hold up the Exhibit A-46, the Trustees Settlement Proposal where they, in effect, determine that wood is not a hazardous substance, that they couldn't sign up to that and consider it as a hazardous substance and say that this proves anything?

You know, it's just been that difficult to have to deal with that kind of line of reasoning because, as you said earlier, it needs to be decided based on the legalities. And those things aren't relevant.

Another thing I want to say, Your Honor, is we've been chasing a moving target here, which is some indication that there is a real problem with making wood a hazardous substance. First it was ammonia and sulfides. Then we show, you know, that it's microbial activity. Then switch the emphasis to 4-methyl phenol. We've talked about that in the microbial activity. Then it's the definition of release, does "escaping," does that mean there is a release. Then it's threatened release. I'm going to get into those.

But as it keeps moving around, that is some indication that there isn't a consistent view here. Those letters that are support -- reportedly EPA's position, they're Allison Hiltner's letter. They weren't cleared at EPA headquarters or by the regional administrator. They're not proved. They're not an EPA position. They're the position of Allison Hiltner.

You know, Your Honor, we've heard talk about why she might have done that. And I would submit that a very plausible reason why she may have sent those letters was to make sure that the HCC was cleaning up the neck and not leave out areas because she wanted complete coverage of that waterway just like Dick Butkus was going to tell the HCC, Here is what we think, you've got to clean it up. That's the most plausible interpretation of why those letters came out. And once the 2000 ESD went into effect there is silence from EPA.

And Kris Flint, who came in here and testified, did not say that was EPA's position because the CFR -- the Touie regulations, the ones that apply to EPA, say she's not allowed to testify as to EPA's position unless she gets approval. She said it was her understanding, so she doesn't establish a position.

Then we had, in this case -- we had the phenol thing with Dr. Michelsen where the questions went so fast and the answers were so clever that for a while it appeared that

Dr. Michelsen was saying phenol, which is an identifiable chemical with its own CAS code, was in wood. Cross-examination showed that was not the case.

But, you know, the plaintiffs have played a little fast and loose with this terminology contained therein. I'm not going to go through this chart. I think Dr. Floyd adequately explained that and how that works. And the substances, even 4-methyl phenol, are not contained in wood.

And this chart, though, is pretty good because it relates to the release issue and the threatened release issue because what it's talking about here is -- it's a multi-step process. You got the worms go after the wood debris, they excrete the wood fiber, then the aerobic bacteria come along, break it down further, then the anaerobic bacteria, then you get the sulfides and 4-methyl phenol.

Because it's a two times removed process, this idea that because we have a waste pile of wood debris on our property underwater, that there is a release of hazardous substances, we don't think the term "release" was intended to go that far. I'm going to skip a slide. I have definition of release, regardless of what terminology is used there, escaping, leaching, emitting, et cetera.

Now, the plaintiffs said something today about the landfill cases. And I would just like to point out, Your Honor, that when municipal solid waste goes to a landfill

then it was -- I mean, it's a witch's brew. It's got stuff in it that is hazardous substances. So if something gets formed, that doesn't -- that doesn't analogize to the wood debris situation where the decomposition process occurs in several stages.

And I would also like to call the Court's attention, I believe I'm correct about this, in 2002 Congress exempted municipal solid waste from CERCLA because it could bring within its purview entities that really didn't fairly deserve to be considered having disposed of a hazardous substance.

So we don't view those landfill cases on point or the waste pile situation. The release has to be of a hazardous substance from the wood debris. It's not from the wood debris.

THE COURT: But -- their argument is, Wait a second, you've got a facility there. And we know from that facility there is a release into the environment of various toxic substances that are listed. They happen to be associated with wood. And I think one of the reasons everybody has danced around language here is that is the way we got started down this road in 1996 and 1997 and 1998 with letters from EPA. Their language was loose.

And I think their argument is, You can look at the *Serafini* case if you want, Your Honor, but we're not reading *Serafini* from the standpoint -- we're not making accusations

that Weyerhaeuser -- at least to CO-14, as if Weyerhaeuser is generator of the PVC. We're looking at Weyerhaeuser as the owner of the landfill that isn't a party to the *Serafini* case. And there isn't any doubt the owner of the landfill is a responsible party because release is -- there is a release of vinyl chloride from that facility. I think that is -- I think that is what they're going to argue.

So that is -- that is the argument, it seems to me, that you -- I mean, I gave them lemons yesterday and they're making lemonade out of it today. That is what good lawyers do. If I would have done that to you guys yesterday you would be doing -- making the best of it and we need to deal with it. Hopefully it's getting us closer to the truth and a fair result.

MR. KLEIN: Couple points about that. First of all, under the plaintiffs' evolving view the -- it still doesn't make wood a hazardous substance.

THE COURT: I agree with you. I agree. I'm not -- you know, like I said, somebody has to do a stand-up proceeding where the best science is brought to bear and somebody says yes or no, wood is a hazardous substance. On the evidence that I have, I'm not -- I'm not convinced that wood is a hazardous substance.

But it's still begs the question of once it's in the water on your property whether or not -- whatever is emanating from

that is on you.

MR. KLEIN: Okay. Just a sequence of points, then, in addition to that one. You know, we really don't think that the cases support going so far when you have a natural degradation process like that, that release was intended to apply to the generation -- and the only thing we would agree to really is hydrogen sulfide on our property as Dr. Floyd testified.

And furthermore, if a release is going to be deemed to occur when you have a pile of organic material like that, the principal applies to all organic material, not just wood. It applies to leaves on somebody's property, at a golf course.

THE COURT: You're right. Exactly -- you're basically back to the Doomsday concern that you had about the landfill and the people who dump wood being a PRP. It still has the same dangerous implications from the wood industry perspective.

MR. KLEIN: Right. But that sort of reasoning is another reason why we think Congress does not intend release to go so far as when you have the natural composition, even if it may occur on somebody's property.

THE COURT: Does Spano go so far to say that wood dumped in a landfill which is -- wood which is not hazardous, TB versus Spano Building Corporation, nonhazardous materials placed in landfill that generated methane or hazardous

materials, 584 Atlantic 2d 583 (1990).

MR. COLDIRON: Can I help here?

MR. KLEIN: I think there were two Spano occasions.

MR. COLDIRON: That was a state regulation that case was talking about. So everyone will know, methane is not a hazardous substance under CERCLA. I know that's shocking to everybody. The natural gas industry exited on that one. Methane is not -- under the state statute it was, and I don't know how they reasoned that. That's the second Spano case.

THE COURT: I've looked at it a couple of times. I'll look at it one more time.

MR. COLDIRON: That's the key twist.

THE COURT: The issue for our purposes or analytical purposes in relating it to this case is not whether methane is a hazardous substance, it is whether or not a nonhazardous substance can become a hazardous substance by virtue of it being in a landfill where hazardous substance are, at least in this case, closely associated.

Okay.

MR. KLEIN: Couple more points. Our hydrogen sulfide, regardless of how it's viewed, was not a driver of any cleanup. I want to make sure that's understood.

THE COURT: Right. Neither was 4-methyl phenol or ammonia.

MR. KLEIN: 4-methyl phenol -- I know the Court made

comments about that being associated with wood. We tried to show evidence that it's not really associated with wood with the log rafting study done by Ecology. It can be associated with wood in pulp mills, but that's a completely different process.

THE COURT: The data to me is not convincing either way. But -- I put it in the category of the PCB release from Kaiser as sort of a second tier or third tier in terms of influencing where this decision is going to be made.

MR. KLEIN: Your Honor, I'm going to skip over the EPA letter because I think we've had enough discussion about that except to point out this statement here which is frequently overlooked when you're talking about what that letter means.

On threatened release, I did have a couple points about that. This is just the language from which threatened release is taken, which says, From which there is a release or a threatened release which causes the incurrence of response costs.

All I wanted to mention -- here is a case. *City of New York v. Exxon* where the Court actually said that the better reading of the phrase -- and I'm over here -- is that a threatened release must cause response costs. The Court was wrestling with the issue of whether release has to cause response cost.

THE COURT: That is why I asked the question earlier in the morning.

MR. KLEIN: Here it's definite because of the language that I just read in this case that a threatened release has to cause incurrence of response cost which goes back it my point that hydrogen sulfide and methyl phenol did not cause the occurrence of response cost because they weren't drivers.

All those threatened release cases that plaintiffs have cited, they're really talking about where the hazardous substance that is the threat is contained in some product or tanks, you've got corroding tanks or spills inside a building, most of those cases found actual releases. I don't know to what extent threatened releases is dicta in the causation requirements I've just talked about.

The wood is not a MTCA hazardous substance. I hate to spend a lot of time on that. Let me just say, first of all, that --

THE COURT: Are you satisfied that if the Court finds the contribution clause in the consent decree gives you MTCA protection that MTCA is no longer a factor in this case?

MR. KLEIN: Yes. I think we are satisfied with that. We are still concerned about this argument that wood is a MTCA hazardous substance.

MR. COLDIRON: And not regulated under SMS.

THE COURT: I understand.

MR. KLEIN: Real quick comments about that. This paper where Teresa Michelsen said it is a hazardous substance is in '97. In the original rule-making, there was no notice that deleterious substance was intended to be hazardous. The notice and subsequent meetings were all about, It's a deleterious substance. Wood industry is not opposing that. We're accepting regulation as a deleterious substance. But no one was told it was going to be a hazardous substance.

THE COURT: Give me 30 seconds of why -- what the functional difference is, ultimately, as to, in this case, the wood industry between deleterious -- being regulated as a deleterious substance or governed as a hazardous substance?

MR. KLEIN: Well, as a --

THE COURT: Real world --

MR. KLEIN: Right. Your Honor, as a deleterious substance as this is intended to point out, Ecology has independent authority under SMS to order clean up deleterious substance, so we understand that. That doesn't change anything. It changes the exposure to liability --

THE COURT: The Wood Debris Group --

MR. KLINE: -- around the timber industry.

THE COURT: The Wood Debris Group, it affects -- the principal issue is third-party liability --

MR. KLEIN: Yes.

THE COURT: -- as opposed to enforcement action by a regulating agency?

MR. KLEIN: I think that's --

MR. COLDIRON: I would fairly say stigma, as well.

THE COURT: I mean, yeah, I understand stigma issue. What happened to the -- what happened between DOE and the Wood Debris Group could have happened entirely independent of a hazardous substance -- wood being declared a hazardous substance. It's a deleterious substance. You got to clean it up. Okay, here we go. I want to understand how the rule works.

Is that right?

MR. KLEIN: Yes, Your Honor.

I guess the Court -- the Court in the original hearing that we held was skeptical of SMS qualifying as a rule by which the director actually told people we're going to make wood a hazardous substance. No matter how the plaintiffs cut it we don't think the SMS qualifies as that kind of a rule.

THE COURT: In my notes I didn't think it qualified as an appropriate procedure for rule-making given the lack of notice.

MR. KLEIN: This last slide had to do with third-party defenses. I have discussed these. Mr. Coldiron will get into the factual for the 4-methyl phenol for air particles.

We have the tailpipe exemption for anything that we may have emitted. And all I want to say about that is there is -- doesn't appear to be much long either way. So legislative history the plaintiffs cited, that is not expanding it to different kinds of motor vehicles or other rolling stock or whatever it was. That doesn't change the capability of the exemption. Logically it's got to apply to the releases regardless of where they land, and that is our point regarding the tailpipe exempting.

I'm going to turn it over to Mr. Coldiron.

THE COURT: Thank you, Mr. Klein.

MR. COLDIRON: Good afternoon. What I want to do, Your Honor, is focus a little bit of time on why the Weyerhaeuser facility as a source of chemicals is a de minimus source. The reason I want to do that is that has significance in allocation, in equitable allocation.

After I do that I've got a couple of cases that I think the Court will find instructive, probably the one most instructive on how to deal with wood is a nonreported case, but it's well reasoned and has a lot of logic in it and it has a floor-ceiling concept that I got a sense the Court was looking at, What do you do with wood? This happens to be foundry sand that had a little bit of hazardous substance in it, so it's a little bit different than the wood. But we've got creosote with PAHs and some storm water, so it's a good

way to analyze how to -- how Weyerhaeuser -- how you can allocate, in CO-14, the wood. I want to talk about that.

The other case is Acushnet case out of the Second Circuit that talks about de minimus allocation. I want to spend some time there.

Then I want to visit with you about the equitable factors that we see here. And then at the end of this, I've taken a little time of my own to say this is a conundrum. Is there any metrics the Court can use to help him evaluate how fairly he's balancing things? I've created a simple chart as a way to do it. It can be modified by the Court. It's not intended to be something we're suggesting. It's really a template is what I'm --

THE COURT: Has it been peer-reviewed?

MR. COLDIRON: It has not.

There are a couple of key metrics you can use and change and get a sense of how you want to set the equitable factors and how that will play in being fair with everybody. That is what I want to try to do.

The Battelle study -- I only got a couple of spots here -- this goes to de minimus. Dr. Boehm noted that the used hydraulic oil -- this was a mass issue and gives you some sense of how de minimus the TEF was from a runoff standpoint, oil standpoint. There is just hardly any PAHs in the oils, the urban runoff, compared to Kaiser sludge and Kaiser

particulate.

Diesel fuel, he noted, had some PAHs but those were the high petrogenic ones. They weren't remedy drivers anyway. What we found in the -- what he found in the urban runoff and in the used hydraulic oil were really truly de minimus quantity. I want to remind the Court of that.

THE COURT: Were they high diesel or low?

MR. COLDIRON: These are the high. That is the highest one, the most volatile doesn't stay around very long. All the drivers --

THE COURT: That is why they're LPAHs. All right.

MR. COLDIRON: All drivers of the remedy were down here.

THE COURT: That's why your use of the word -- the LPAHs are the ones that --

MR. COLDIRON: Volatilize and weather the fastest.

This is the last slide. It just found that the Wood Debris Group petroleum dog pilings pavement, they were insignificant sources of PAHs. We were criticized after the fact today by -- and during the trial for not thinking about all the places to sample. Well, they sampled right outside of the sampling points for the permits but as close as you could get to the discharge of those things. And these sludge things, that's being hauled off site and disposed of. It doesn't tell you anything about the storm water to sample the

sludge that has been picked up and managed properly.

You know, they pick at us on that. The purpose of the study -- it was an expensive study to deal with this thing that got dropped on them that they were a big source of PAHs. And they knew EPA was looking down the barrel at them through this multi-party thing they'll use that to allocate and they did. Weyerhaeuser ends up being a higher percentage than Kaiser. Something was wrong. They had to react.

And it -- they did react. And it -- EPA understood it when it was all said and done. But it doesn't -- that wasn't an easy curve to follow. It took three years and a lot of work, very complex, as the Court knows.

The point of this is the upland, I think the Court acknowledged, it's not a significant source. It's a de minimus source. We can't say there is not hazardous substance, I'm not fussing with the Court about finding us liable as a chemical source, that and the creosote pilings because that's the bottom line.

There is -- in CERCLA concentration doesn't matter and mass doesn't matter. So we're there as a liable party. I don't know how that -- because we're a chemical party, because of the -- because all of these sources are de minimus in my view based on the evidence that we've heard, I don't know how facility works into that any different -- how many times can you be a de minimus liable party and it matter?

The Court -- the case I'm going to discuss with the Court says that what is important is: Does it drive the remedy or not and does it cause any response costs? That is the key equitable factor to look at.

The sort yard, I've talked about it, log sort yard. This was testimony by Mr. Dalton agreeing in his trial transcript that what ran off of it looked like urban storm water -- industrial storm water, nothing surprising. And yeah, there was an urban runoff storm water impact down in CO-14.

Mr. Farlow agreed with me, seems like yesterday, I hope it was yesterday. This trial has been going too long. He agreed what is driving the remedy in CO-14 is not the petrogenic part of the chemicals here or the Ls, it's the Hs. That is what everybody was focused on. That is a concern from Kaiser and so the -- my point here is what sources Weyerhaeuser had dealing with petrogenic PAHs, they did not cause any incurrence of response cost. That's not the reason they're out there digging. And there is not enough mass there to matter anyway.

This is another slide from Dr. Boehm confirming in the Kaiser Ditch he couldn't find a TEF fingerprint dealing with all the things they sampled at the ditch. Again, from upland arsenic was background or less, zinc the same. The upland facility is just a de minimus chemical party. That is what the upland is.

We'll talk about creosote in just a minute.

Wet scrubber sludge and the 4-methyl phenol. I need to remind the Court what Dr. Boehm offered regarding finding the 4-methyl phenol. It was quite high, one point something part per million on the outside of the wood. That is a high hit. Dr. Floyd said that all these sites he's worked on wood, they hardly find 4-methyl phenol. Even though she knows bugs can make it, it's very little levels when they find it. When they otherwise find it it's related to pulp mill where the chemicals are making it.

Honestly, where was that from? What was the science and the logic? And I don't think we have to check our commonsense here when we come in the courtroom and deal with science. Commonsense plays an important role in trying to sort through all this.

And so Dr. Boehm -- he's the only one that really offered evidence on it -- he reminded the Court that there was two types of Kaiser emissions and they had different signatures. And we sampled one of them and the State sampled the other one. And I'll flip through these real quickly. Recent literature, very recent literature gave him the ability to identify these sources and make the comparison to the two different sources. And this was the last one that gave him the comparison to the other source. And so he was able to conclude that what was on the wood chips was impacted by air

emissions and roof dust from the Kaiser facility consistent with their multiple sources from these -- from the aluminum smelters.

That is significant because there has been a lot said about the wood creating it or somehow containing it or the bugs doing it. Bugs don't produce 4-methyl phenol at 1.2 parts per million. Obvious conclusion is it came in there from the air source. The most logical place for that to be, and he offered a lot of other testimony why he believed it was from Kaiser, air emissions was doing that. He noted it wasn't a diesel emission.

He also said he found it over in the Taylor Way upgrading from the Weyerhaeuser facility. He found the same emissions in that fingerprint. And we had almost a 1.2 parts per million 4-methyl phenol of p-cresol in those samples up there under Taylor Way, the street.

So what do you deduct from that? You've got some over at Dunlap. You've got a source from Kaiser. It's blowing some stuff around. You know it's irregular. That is why you see different concentrations even on the Dunlap yard. The dots connect. It's not from Weyerhaeuser wood. It was landing on all properties and waterway, as well.

I want to look at chemistry in 14. We know Kaiser was a continuous source from about '64 to '92. Dr. Floyd testified it wasn't just these two episodes. That is why she testified

below the '69 dredge that counsel criticized her for there was probably wet scrubber sludge down there because it had been coming out since the mid-'60s, since they dredged in there in '65, they had been putting it through the waterway.

And the '69 dredge, which they say is when it happened, they left some stuff between the '72 and '69. And that would have come from these continuing earlier releases between '69 and '65. I got the dates wrong. That is an important issue.

We talked about the concentration gradient, the bathymetry, the pilings and the wharf. I want to move to the slides.

By the way, let me say something about the bathymetry. Superfund is hard enough without trying to beat up all your science and say, I've got a tough job, this is rough justice, give me some metrics. I need something to put my hands on here.

You know, everybody in the case used bathymetry. And when Dr. Floyd started using it for calculating volumes and it became bad stuff, even though the Corps used it to pay their contractors with, and Ecology and wood debris used it and reported in all that massive documents you have, they used it there.

So Dr. Floyd came in here and made a very -- and did a very good job explaining what she did, how she used it, why it was reasonable to say, We can figure out this claim for

you judge. Obviously Weyerhaeuser didn't show up until 1971. So we can figure out what is below '71 and we can figure out what is above '71. I can take the Kaiser sludge out of the equation. I can tell you how much wood is there. So I don't think it's a good idea to abandon Dr. Floyd's work here because it's a good metric.

Now, the Court may want to adjust that metric because you've heard testimony it was hard to get out and various things.

But the table I'm going to offer at the end will allow the Court to make an adjustment to see what happens if you do that.

In terms of using bathymetry as Dr. Floyd has and her tables that give you the volumes, I think it's very important data for the judge to have and to use.

Here we merely see the pre-dredge Kaiser sludge deposits and post-dredge. You've seen that exhibit. Here is that comparative one where you have the chemicals and the -- and Dr. Floyd's -- what is left there in CO-14 showing that primarily -- now, I think we've made a good case there is PCBs and arsenic mixed in with this stuff. And you say, How did it do that at depth? Because it started going out there before they had these two massive releases.

When the sludge started getting deposits in these ponds and by the time the thing was dredged there was PCBs and

arsenic floating around in the waterway and getting moved around after they got it dredged in '65 so it got intermixed. So that is why you see these things at depth. It was deposited at depth at the time.

This is the basic chemistry that is driving remedy. You've got Kaiser PAHs, you've got General Metals' PCBs and arsenic from Arkema. That is the chemistry of CO-14.

Now I want to talk about creosote.

First I want to go to CO-14. Interestingly enough, this second case I'm going to talk with you about was a Sullivan's Ledge in New Bedford, Massachusetts. It was an unpermitted dump. They had a bunch of telephone poles and butts from telephone poles deposited that were loaded with PAHs.

So the Court looked at an interestingly fact situation similar to this one and finding there was no -- while they were a liable party, he didn't apply any response cost because it was not measurable beyond background.

I think there was adequate testimony and evidence here on the 30 to 50 poles and stubs that they just didn't contribute anything. Or did they trigger CERCLA and make us liable? Absolutely. Did they add anything to response cost? Not a penny. They weren't -- maybe digging the poles out, whatever few bucks that is, but the chemistry didn't add anything to the plaintiff's cost.

Here is the concentration where the poles are. They're

just not causing anything to happen. They're not a source of the PAHs in CO-14 in any significant way. I'm not saying they're not there, but any significant way.

And then this one he used, Dr. Boehm did, to describe what is -- if the dock and 1700 pilings over there are a source, why aren't we seeing it? That is how scientists use these kind of things.

You see the Kaiser Ditch but you don't see anything from the TEF. I have more on that. But I want to remind the Court of that.

Mr. Farlow, in his trial and deposition we read in the trial, there was a couple of samples right next to the TEF wharf going towards Hylebos Creek. And I asked him in deposition and he hadn't remembered it during the trial but we pointed it out to him, I said, Did you find creosote there?

And if the TEF is going to be a source for contaminated sediments right behind where the ships were supposed to stir it and push it out, you would expect, in all logic, to find it there and they didn't find it. Mr. Farlow says they didn't contain any significant amounts of Weyerhaeuser creosote.

So that should be telling us that the TEF wharf is not a source of any significance here. And there was a whole host of other reasons as to why that is true. But this is very

strong evidence that the TEF wharf is not a significant source to anything, not to mention the conundrum of trying to get it from there down and locate it right there in CO-14 somehow miraculously, which is counter to the net sediment transfer which is toward the head.

There is all kinds of fate and transport mechanism problems. Even if you had a source, would it ever get down there? Mr. Cox reminded us that would be very difficult given the stagnant nature of the Upper Turning Basin and the fact that flows winter and summer and the bottom third to half come into the Upper Turning Basin. I thought his evidence was very strong because it's measured data. It's not hypothetical data. They took actual measurements. We'll talk about that in a minute.

Here is my summary on the TEF creosote. The sediment didn't require any cleanup. That should be a red flag, may not be the right thing to say. First and foremost, I don't think regulators miss very many sources at a Superfund site like this. There is thousands of creosote pilings. As I've driven around the last six weeks around Tacoma it's easy to see them in the waterway. Heaven's sake, there is probably 150,000 of them around Commencement Bay. But they're not logically -- regulators wouldn't have missed that. Right off the bat that should tell you that.

Literature doesn't support -- it supports limited creosote

impact very close to the immediate area of the treated pilings. I eliminated all those slides. It just doesn't go very far. I think Mr. Dalton says there is steady state biological or certain level of bugs that get in there. Seemingly after a few years it reaches a steady state and you don't see any increase. He didn't have a full explanation. Mr. Brooks' article seemed to indicate that.

I'm not saying it's not a toxic problem, it doesn't have problems with it. In terms of Is it really impacting a broader area? The literature doesn't support that. It doesn't support there is really any significant leaching, like Mr. Farlow tried to offer through that formula. And, you know, those numbers, just because it contains that stuff doesn't mean it leaches out that way.

So there is not an evidentiary basis to find a viable sediment transport mechanism from the wharf to 14. And that's where the costs were incurred. There's no near wharf chemistry or Upper Turning Basin chemistry indicating there is impacts from the creosote at Weyerhaeuser's wharf. Literature doesn't support pilings are a significant source. CO-14 PAH concentrations do not support it.

Dr. Boehm says it's different. You can't use something from Canada and say it's creosote from CO-14. We've got a sample, why don't you use it? They didn't use it. Commonsense says, you know, it doesn't add up.

By the way, they hit this sample under the wharf that the Battelle study did that had elevated PAHs. I want to remind everybody Dr. Boehm testified there was a lot of wet scrubber sludge in those samples and there was -- there was a faint PAH signature that he identified with creosote. But to attribute that to creosote wouldn't be fair.

Quickly on the measure net circulation. You remember where Mr. Cox said we put the instruments out and where we study go quickly to the summary. I'm not going to play the little video, but very elaborate study. Very good impressive scientists. Guy knows his business. That is all his firm does. He established there is a net current inwardly, and Dr. Floyd testified, and that current if ships go by, indeed the last two things here, do create enough energy to resuspend and that is why you can see it in the bathymetry. It will get resuspended. She says it gets redeposited on sides and some goes to the Upper Turning Basin.

So that particular aspect of it makes it very difficult to get a transport mechanism from this TEF wharf, where they say it's coming from, down into -- somehow radar in on that spot in CO-14 where these PAHs were found, which I think everybody understands is from Kaiser.

Let me talk about de minimus sources and try to summarize them. I might -- I don't agree with the Court's analysis that the wood waste piles are generating a hazardous

substance on our facility, but if they did -- the reason I don't agree, I don't think natural biodegradation is -- in any way can hold an owner to generating a hazardous substance.

Every farmer's peat bogs, everybody walk by and smell hydrogen sulfide, this goes on across the world, the whole earth. Good for it or we would have lots of problems. When wood dies -- something needs to happen. God has given us some bugs to take care of that. That doesn't mean it's all hazardous or what they produce is generation of a hazardous substance on your facility. I totally disagree with -- and there is a case -- I can't think of it, I'm getting too old -- that says, You don't have to take CERCLA so far that you end up with a nonsensical result. And this is that point right there. It's just going too far, trying to stretch CERCLA too long to capture this idea that Well, there is a hazardous substance being generated.

There is whole bunch of sources here, I believe I would argue, that if the Court believes that's true, it would be de minimus as well. I don't think -- there was no SQOs, as Mr. Klein says. There was no contribution to the cost from what the bugs were doing, just absolutely none. It doesn't increase the cost whatsoever.

And as all of these different types of sources are, the upland was nothing more than urban runoff, which is

background. CO-14 had urban runoff signature. PAHs were not the remedial driver, the petrogenic ones, the LPAHs. The Kaiser Ditch had a petrogenic source, but it wasn't identified with the TEF or if it came from Taylor Way or maybe Kaiser.

The wharf creosote signature, I've covered that. It's de minimus, it doesn't even show -- there is no evidence that supports TEF creosote got into CO-14. Is there some releases around there? Absolutely. But that wasn't a release in CO-14 that created any response cost to be incurred. And that's the important aspect of it.

Pilings and stubs, was there a release there? Yes. Was it measurable? Dr. Floyd said no. Dr. Boehm said no. They're just insufficient mass there for the -- for the CO-14 pilings and stubs, the 30 to 50, whatever number you want to use, to have any meaning in the sense of what is going on in CO-14.

Then there is cables and spikes. There's just a few yards of those. And they're very insignificant. We're not saying they weren't there, though.

And, you know, there may be some other de minimus sources, but the whole point here is as a chemical party Weyerhaeuser is de minimus. And I'm not saying that about wood, I'm saying it about chemicals. So I'm going to sort when we -- I'm going to sort out wood and I'll try to deal with it and

then we'll talk about chemicals and how you might look at us as de minimus chemical party. We'll go to this case and talk about it.

This is an unpublished case. It wasn't reported in Fed Sup. This is the only one I found that answered your question: Does this term "driver" or "drive" get used? This Court -- and this had to do with Blaw-Knox sand. This was up in Gary, Indiana, it was right near Chicago. Everybody was dumping, mixing it up back in the early days of the '70s. The sand had a little bit of phenol in it, like 18 parts per billion, and a trace of furan, which is one of the exotic dioxins. But the point here -- as it ended up, EPA ordered sand to be used as additional cover for the remedy.

But they analyzed this case -- you analyze this case on Okay, I view it as, okay, here is something similar to wood, sand. And you got de minimus amount of chemicals in it. How is a way to look at this thing? The Court noted a key equitable factor in CERCLA allocation is whether an allowable party is responsible for the hazardous substances that drive the remedy because its remedy drivers are the main reason for undertaking response action in the first place.

And consequently for incurring response costs, the determination of which liable parties have contributed to the remedy drivers is critical to adjust in fair allocation. So that is a fundamental concept here.

Court found they hadn't met their burden here. But there is some very important language I want to share with the Court. At the top it says, Indeed a Court must ask how each party's waste affected the total cost of the cleanup. Zero allocation appropriate where party's waste did not significantly add to the cleanup cost.

And then it starts talking about CERCLA applies only to release or cause incurrence of response cost under the legal constraints of the new Akzo case, they reviewed this and they said WCI was the party to be allocated.

And they're looking at this concept that I saw the Court go to. WCI may not be allocated less than the increase in marginal cost of cleanup due to the presence of Blaw-Knox foundry sand at the site no more than the total cost it would have born had it been the only polluter.

Therefore, plaintiffs may not recover any share of the site response cost from the WCI unless they have proven by a preponderance of the evidence that Blaw-Knox foundry sand significantly increased site response costs, to the costs that they seek to recover from WCI represent at least the increase in marginal cost necessitated by Blaw-Knox's foundry sand -- in other words, the floor, established in, they quote Akzo. And third, the cost they seek to recover from WCI represent no more than, "The total cost it would have born had Blaw-Knox foundry sand been the only material placed in

the site -- in other words, the ceiling.

When you asked us to look at what would have Weyerhaeuser's responsibility been for the wood under its agreement with Ecology if -- wasn't any chemistry. I think this case picks up on this idea.

And I want to share with you some information that we have in the file that examines what the floor would be, and would look at the ceiling.

THE COURT: We're going to take our mid afternoon break. Let me ask you, with regard to the -- I'm trying to keep time and the length of the break.

How long do you think rebuttal will be? You wanted an hour.

MR. MYERS: We went from --

THE COURT: We've been trying to shrink the number of issues.

MR. MYERS: We went from 9:00 to 11:25. My understanding was, given how you broke it up, that included breaks. And so we've got 35 minutes left on our clock. They've got -- they did 35 minutes from 11:25 to noon. They have now added another hour and a half on top of that so that looks like they've got --

MR. COLDIRON: I don't think I'll take the full hour.

THE COURT: All I want to do is make sure everybody gets a chance to say everything they want to say because

staff, at least -- this is fun for me, it's not -- it's less fun for them.

(Court in recess.)

THE COURT: Please be seated.

MR. COLDIRON: Before I move to the next case I want to make a couple more comments about this Ninth Avenue case. Here they didn't assess any lability or any cost on the foundry sand because EPA had decided to go ahead and use the sand for part of the remedy. So the Court said, Really, this cheaper sand was a net benefit to the site, so they didn't find any evidence to say that there should be any marginal cost.

The Akzo case, I want to briefly touch on that.

THE COURT: I've read it. Go ahead.

MR. COLDIRON: Hypothetical that is there, if you have volume of the performing party spends $500, and the marginal extra cost for the nonperforming is another hundred dollars, then the $100 becomes the floor, the difference there of what it cost them to do the extra volume. But if the nonperforming party standing alone would have had to do it, he would have spend $900 for his volume, then the ceiling becomes the 900 and the floor is 100.

That hypothetical they use in the Akzo case is where this concept came in the Ninth Avenue case.

THE COURT: If you were to do that hypothetical for

this case, how would you do that?

MR. COLDIRON: I'll show you.

Next case is *Acushnet v. Mohasco*. We had an unpermitted beautiful scenic place that over the years become a dump, trash dump, Superfund site. And unfortunately for that.

But there was some interesting fact questions here and they were dealing with de minimus parties. These were parties EPA left out. The Acushnet group were the performing parties, a large group of companies listed there, and other companies did not get named. They got named, but EPA didn't pursue them, similar to Weyerhaeuser here. They had to deal with some kind of unique facts.

This one, a company called Nett, N-E-T-T, had dumped a bunch of old -- it says here, The butts of old telephone poles that had been treated with liquid creosote. The Court describes it as chock full of polycyclic aromatic hydrocarbons. And there was also discarded scrap table containing lead and copper and zinc. There were some other things generated by the other parties.

And in looking at this, Court granted a summary motion and -- as to Nett and they just said that the scientific evidence showed that the creosote-treated pole butts could not have leached PAHs into the soil in an amount greater than the preexisting background PAH levels and that other sources provided the overwhelming proportion of PAH found at

Sullivan's Ledge. Sullivan's Ledge is the unpermitted waste dump.

Because plaintiffs did not produce any evidence challenging that testimony, then there was nothing to try. And the lower court had a causation basis for it which the second -- First Circuit here said that's not the law here. But they said on the fact we can uphold the decision.

The other thing was -- this is another look at de minimus -- was this cable. They made this analysis how much was there, and a couple of cubic yards, I think, versus the overall volume. They said it's not enough to be even talked about. This de minimus party shouldn't even be here.

So all these de minimus parties were not found to have caused any response costs. And at the bottom here they say the evidence at trial, again, fails every version one might conceive of an equitable factors test. So while there might be liability, there is times for de minimus parties where it doesn't make sense to charge them with anything.

So they note the basis for it. And three is where -- under 9607 where you have the release or threatened release clause. A little footnote said that the hot contest here was the correct legal standard by which one had been said to have caused it. That was what the fight over. And I guess that's what the fight is over here, Judge.

THE COURT: Yes.

MR. COLDIRON: The Court went on to say that -- the lower court here -- that the causal element, you don't have to have anything more than they do in the Ninth Circuit. If there is a facility and release of a hazardous substance, that's enough causal. And they disagreed with the judge on that.

But they -- on the evidence they said that it doesn't necessarily mean, however, that the de minimus polluter must necessarily be held liable for all response costs. They were looking at it not under the Pinal Creek contribution several standard out here, they were wrestling with joint and several. And they noted that you could escape liability if it's divisible.

And the logic there is if your harm is divisible and it's so little not to count that it doesn't even cause you to incur response costs, at the end of this case they say in equity in 113, the judge that charged with this can do something about it. He can fix that if you're that de minimus.

THE COURT: So you would say, for example in this case, what strikes me is in the real world wood increased the cost of cleanup significantly by virtue of its volume. But this Court is holding that wood doesn't give rise to CERCLA liability as a hazardous substance itself.

MR. COLDIRON: Yes --

THE COURT: But to the extent it is associated or generates, or whatever, ammonia hydrogen sulfide 4-methyl, those didn't drive the cleanup and didn't add the response cost. On the other hand, PAHs did. And the creosote, which is a hazardous substance, CERCLA gives the hook creating CERCLA liability, you're de minimus.

MR. COLDIRON: Exactly.

THE COURT: But then wet scrubber sludge, which is the driver of the response costs here is an orphan share.

Are we comparing Weyerhaeuser's de minimus share with General Metals' perhaps de minimus share and splitting on that basis or are we going to say, You, General Metals, were in this soup long before we got here and for a variety of reasons and this is the area that CERCLA carved out for you to clean up. So we're looking at Weyerhaeuser severally, even as to division of orphan share and we focus on Weyerhaeuser only, they get a de minimus share, you get everything else.

MR. COLDIRON: I heard exactly what you said. And it can all be thought through that way. I want to say what I think these cases are instructing us on that, helpful to you perhaps, I think the hook is there. We're de minimus chemical party from three or four sources. No question about that.

I think under the case I just talked to you about, the

Indiana case, the foundry sand case, you can say under the equitable party you have in 113, I got a liable party here. I want to do something about what -- even though the wood is nonhazardous, I want to do something about that because these folks spent money to get rid of it and it caused them some problems when they were getting rid of it. They had spikes that flattened their tires, and all the reasons that they said.

You should look at that and decide how much should be allocated past the floor, which is what we caused. You have to decide, Your Honor, how far you want to take that. But I'm going to show you some metrics in a minute that give you the power to do that. I won't spend a lot of time here.

But I do want to say that -- let me -- well, there is an actual statement here at the bottom, Alcan II panel -- that's a real famous Superfund case -- took great pains to leave the questions of liability, including divisibility of environmental harm and equitable apportion of cleanup costs, to the sound discretion of the trial judge to be handled in the manner and the order that he or she deems best.

I think that's some of the best law we have because you're the one that can listen to everything. You understand it and you can do some things to make sure it's fair and follow the law at the same time.

I'm going to jump back here. I pulled out quite a bit of

this. There is a line of cases that say spills could be so inconsequential as to where nothing should be assessed and whatnot. At the end of this case it talks about three reasons why de minimus -- a de minimus party doesn't have to pay a whole lot. There is a concept that maybe we should under Superfund just because you're liable. And the whole idea behind 113 was to take this draconian sting of joint and several liability out of people who really shouldn't be standing out there.

So the case discusses three reasons. It talks about congressional intent was never to reach everything out there, wood, for instance, and make it hazardous or impose on there any quantity of a hazardous substance. So there is some cases that go along that line.

So this particular piece is worth thinking about. It says, Third, the CERCLA defendants who prevail on issues of fair apportionment, even if summary judgment stays allow the CERCLA defendant to prevail, is consistent with Congress's intent that joint and several liability would not be imposed mechanically in all cases.

Permitting a result that is tantamount to no liability finding is in keeping with the legislative goal that cleanup efforts begin in a speedy fashion and that litigation over the details of actual responsibility follow. In fact, to require an inconsequential polluter to litigate until the

bitter end -- we feel that way, Judge -- that -- to the bitter end would run counter to the Congress's mandate that CERCLA actions be resolved as fairly and efficiently as possible, and on the whole the cost and inherited in fairness.

And second, saddling a party who has contributed only trace amounts of hazardous waste with the joint and several liability of all costs incurred outweigh the public interest in requiring full contribution from de minimus polluters.

That says how I feel about this based on our facts in this particular case.

Then it says there was argument by the plaintiffs, No one will sign a consent decree again if you let that happen. Court says, Because we ground the quantum inquiry solidly in 9613 F, we are satisfied that the prophesy will not come to pass. The ultimate failure of a contribution claim because someone did only a negligible amount of harm does not impede enforcement by EPA or frustrate any of CERCLA's objectives.

And, you know, you don't have to make wood a hazardous substance here to cause Weyerhaeuser to pay its fair share for the wood. We're a de minimus chemical party. You've got the power under 113 to fashion what is fair there. But -- you've got the power under 113 to decide how orphan share should be distributed. I don't believe that orphan share should be distributed based on Weyerhaeuser being responsible

for nonhazardous wood even though you have the power to do it, to hold us responsible for the wood.

I want to go through what our costs were. Mr. Klein noted this. We've never been treated like we've ever done anything. That's been a constant theme although we did quite a bit for a party that has a log sort yard with wood on it, one single piece of equipment that is of any significance, a de-barker, loading ships. I mean, we've done a lot. We paid a lot. And, you know, the study cost and remedial cost and Kaiser Ditch and TEF study cost all came up to $5.4 million, they act like we didn't do that, that we weren't cooperative with the agency, that we didn't function, that we didn't dredge and that we didn't do these studies, we didn't cooperate with EPA. That's all wrong. We did. These costs were legitimate costs and they should be considered by the Court as an equitable factor.

Mr. Recker gave us a metric on disposal at PSDDA. And I don't think anyone is really disputing that particular 59 bucks, roughly. And then he also give us the reason and rationale behind the Battelle study cost of $1.9 million.

I want to look at plaintiffs' incremental wood cost, which I'm going back to the Ninth Street landfill case. We can see the wood, we know where it's at. It's identifiable. And Dr. Floyd estimated those volumes for the wood two ways. In her first analysis, bottom line, she comes up with 5500 cubic

yards and she said that number was good plus or minus 25 percent. She used bathymetry. It's a legitimate number. It's one metric the Court can use in considering it in terms of the wood there is -- it's above the 72 line or very near it. Maybe not perfect, but when you add or subtract what she did and what she said, it's a fair number.

And if the difficulty of removing the wood or whatever you want to think about the wood needs to be increased, it's easy to increase that volume and add to those costs. But it's a real metric is what I'm saying.

Mr. Dovell, who strikes me as very knowledgeable in Superfund, very sharp guy, he analyzed all the costs of the HHCG and he said there is some things in their cost that shouldn't be there for the marginal or incremental cost. You recall that, Your Honor.

And he came up with a very important metric for the Court to use, I think, and that is the cost per ton. And the cost per ton is 49.23 when you take all their numbers and pull out the things that shouldn't be there. And that is their real out-of-pocket hard dollar regardless of -- all of this was going upland. That's the real cost they went to.

If you convert that to cubic yards, which is a little easier to use, you get $72 a cubic yard, which is roughly $20, $22 more than the PSDDA disposal cost. So their real bottom-line cost of about $72 compared to 60 that we have.

If you wanted to think about our floor, if you don't agree with the 5500 in her -- in the table, the one she offered this week, it was 5600.

In my table I'm suggesting you can adjust that however you want to, to say this is equitable volume for wood. You run it by the $72 -- in my table you can see how that's computed that fairly easily -- you increase this number -- if you want to use the plaintiffs' real out-of-pocket costs you increase this number by about 20 percent and that's what -- that's what they had to pay for taking the wood out of there.

So I would view this as the floor dollars. This is marginal or incremental cost for dealing with or managing wood even though it's not hazardous in CO-14.

Is that understandable?

Let's look at Weyerhaeuser's wood debris consent decree obligation. We've seen this chart. This is Dr. Floyd's analysis. She did it a different way through a different door, really put a lot of work into this. Use TVS and the -- all the barge loads and everything she can get her hands on for three days and she ends up at 5600 cubic yards saying -- although she didn't subtract some areas where she thought she might be able to, she left it all in, we're still at 5600 cubic yards.

Only way I can relate to that is a big dump truck is 10 cubic yards, so this is like 550 dump truck loads coming out

there. It's not a small volume of wood. It's a large volume of wood.

In my view, if the Court wanted to a bullet on us use a number. If you want to make them totally whole for the wood, one was $72, you come up with $550,000, $600,000.

How much sediment is associated with that wood? We feel like yes, if there had been no chemistry we would have removed that sediment under our consent decree. She gave us a range of between 13,900 and 16,200 cubic yards as reasonable. She felt those were good numbers. It's comparable to the 15,000 she did the other way.

So if the Court wants to impose more volume on us for this contaminated sediment, all you have to do is say, Okay, I'm going to add to Weyerhaeuser's burden here some of this sediment. And you've got -- you can take it all the way up based on her numbers, which I think are good numbers, the total there would be -- if you go the wood and add it on it's about an additional 10,000 cubic yards belongs to sediment.

So, you know, that would be something the Court could do. It could add sediment on to whatever you think is fair or you could add to wood. I'm not trying to suggest I know it all, but I do understand numbers pretty well and I do understand volumes. I know this metric here and the Table 1 is an important metric.

You -- you've not talked about 13. I'm going to use her

Table 13 in my -- end table on orphan share. But it's there.

Now I would like to visit about equitable factors for a little bit. We started as an industrial site. We know Kaiser has a lot of responsibility. They emitted a lot of different waste. We know Arkema put a lot of metals into the waterway. We know that General Metals put PCBs. We know the sort yard is de minimus. I don't think there is any evidence to indicate we're not a chemical de minimus party, but it's from several different sources, I grant you. But all of them are de minimus chemical volumes and none of them caused any -- either plaintiff to incur response costs. We put wood out there.

This is the site thing that Mr. Klein suggested. The Court can, if it wants to -- I don't think it's a good way personally. I think the wood debris site is where chemicals and wood mixed. I think that is what this lawsuit is about. I think a way to look at this is: What did the five performing parties do, not just the three of us? There is five performing parties.

You'll find in my table and analysis that Manke did more than anybody. I know it didn't start out that way and he wasn't planning on paying for chemicals, but he paid for more than anyone else.

THE COURT: And he's not happy about it.

MR. COLDIRON: But a better site to use for orphan

share analysis. I'm saying here is what you've done, you have fixed the wood by making us pay some volume. I don't know how you'll set that. You've got metrics. And we'll pay "X" dollars and the wood deal is done.

Now let's talk about orphan share. Here you got the site, you've got chemicals, wood, five people dredging out there. That's, in essence, what you have.

And here is some factors that go into that. Weyerhaeuser, as Dr. Floyd noted, has been dredging stuff for a long time. And ever since they've been there, according to Dr. Floyd, we've been dredging wet scrubber sludge from around our facility that gets moved up the waterway.

How much of this 61,200 yards accounts for wet scrubber sludge? I don't know. We didn't get an estimate. But she said it was there.

So I think that is a factor to put in the back of your mind when you think about what Weyerhaeuser's responsibility because we've removed and paid for in the past wet scrubber sludge removal.

We've got our costs. We've covered those. We've got the volume that we dredged under the consent decree and it amounted to -- this is not the corrected volume, but -- table, but I'm showing this to say We've some cost that go to PAHs that is from wet scrubber sludge. No one disputes that those PAHs we dredged in excess of SQOs -- I think it's 5600

cubic yards -- wasn't wet scrubber sludge. It's undisputed that the PAHs were.

Now, this is Dr. Floyd's Exhibit A-795. It shows how much Manke did, how much Manke volume exceeded SQOs and how much of that volume was PCBs greater than 300. And Manke, 45 percent of what they took out of there sediment wise directly benefitted the chemical parties here. And all they had was wood. And you'll see in my orphan share analysis they've overperformed everybody else.

THE COURT: I think Mr. Jacoby indicated they had started out as a chemical -- they were brought into the --

MR. COLDIRON: I think they had some metals around their dock. But they ended up moving a lot of sediment and a lot of wood for reasons -- they had this large amount of wood. It served as a barrier for sediment to sit on so they moved it. So they end up in the mix benefitting all the parties really because they moved a lot of sediment that should be considered.

You remember the Battelle thing. This is an equitable factor in Weyerhaeuser's favor the Court should balance. It was an expensive study, but it performed an important function. It identified Kaiser as a major source. They had somehow, amazingly so, been able to duck that. I can't believe with all the historical stuff nobody dug it out and figured it out. No one had. Weyerhaeuser did and EPA used

it and so did the trustees.

The only negative on that, and it's not Weyerhaeuser's fault, Kaiser took bankruptcy. They should have paid all this. But it wasn't that these costs were incurred in good faith and we should be given some credit for it.

Back to the comparative analysis, we've talked about that one. This is the settlement chart out of the consent decree that we got into evidence. This has the settlements of the plaintiffs during the case. This was Mr. Gross's exhibit where he looked around the Hylebos Wood Debris Group site and -- we're not trying to put in play the whole $10 million. That's not a good way to do it.

There is about 2.1, 2.2 million here that pertains to the Hylebos wood debris site. The other 8 million goes to the Middle Turning Basin where chemicals were.

This is a better way, I think, to say what happened here and how does this fit in to the equation or calculus, however you want to talk about it? So what are some of the summaries here that are important --

THE COURT: Characterize your view of what those settlements were for.

MR. COLDIRON: They were for a whole host of things.

THE COURT: They're CERCLA related.

MR. COLDIRON: They were CERCLA settlements. They included for contribution like the Asarco slag and their

contribution. Obviously there was probably some settlement -- at least volume concept dealing with the wood. You've got some future costs tagged in.

What drives the numbers are premiums you get for settlement. For getting out you pay a big premium. The number's about double here. So the premium does something. I mean, in these settlements -- and under the law they're suppose to reduce everybody's liability -- we haven't gotten any money. My analysis is they've got the money. I'm not looking at this from a dollar standpoint. I'm analyzing it this from a cubic yards standpoint. It's a lot easier to figure out.

And this -- Mr. Dovell's number, the $72 into that, that's a cubic yard they got. It's easier to analyze it when you do that. If you want to give us credit for the Battelle report, give us some of the money, divide by the 72 and you get volume. You will know how much credit we get against Kaiser. It's an easier way to analyze what is a very complex pie.

Okay. Volume -- main equitable factors under the case law. There was a lot of industrial plants and a lot of history. Of those volumes the TEF is de minimus. We talked about that.

The driver for the remedy is a chemistry. And there is three chemicals here. Plaintiffs have always tried to act like they don't have chemicals. That's been exposed in the

litigation here.

And, Judge, I don't think these are bad people. I really don't. I mean, I admire the companies for stepping up and doing it. I work with companies all the time and so does Mr. Myers. We're not here picking on each other. I know lawyers advocate positions. All the companies in the room here did what they should have done. I agree with the Court on that.

But nonetheless, they're the ones under the law that created a problem. They created a problem for a long period time and it had far-reaching influence in the waterway. The law holds them principally responsible. That's the way it works.

They tried their best to make wood hazardous. They tried their best to say that biological testing means wood was in the ROD. It doesn't hold up. Wood was not in the CERCLA consent decree and statement of work. It wasn't in the 2000 ESD and wasn't in ROD in a direct way.

Even though they talk about consistency with the ROD, sure it is, it's cleaning up the waterway. When Ecology said, We're taking care of this, it's got to be consistent because it's the goal. Regulators aren't going to say anything differently. Make no mistake about it, chemistry is driving this remedy, and just chemistry.

Incremental wood. When I did this it was -- I used 5600. I say that's the floor. If the Court wants to adjust that

volume, you adjust it, multiply it by the $72 per cubic yard that Mr. Dovell used and you come up with a higher number. That allows the Court to satisfy itself and everything it's heard, all the testimony, what Weyerhaeuser's share that admittedly we get hooked into because we're a de minimus chemical party that we have to pay for the wood that is there. Weyerhaeuser has said it's willing to do that. It's never said it wouldn't do that. And I think it's a fair result.

We don't know how to set the number. You've got to set the number.

Weyerhaeuser -- CO-14 -- this is the other part of the equation that you asked. I don't know how you're going to apply it. I believe from the case law I brought to the Court's attention it represents the ceiling. These are total volumes that include all the wood and all the sediment above the '91 bathymetry when Weyerhaeuser started operating in that area next to CO-14.

If the Court wants to impose on us all the sediment including the wood debris that is in CO-14 from the time we started operating on the waterway, then you run the number at 13.9 to 16.2.

Now, this number -- these numbers use the PSDDA cost. That won't make the parties whole. You got to run the number with the $72. It will increase these costs like a million to

a million and a half, something like that. If the Court feels inclined to do that, that is within the Court's power. You're the one that has to decide for us. We don't personally think we should be paying for chemistry.

If you think that's a fair way to deal with orphan share, let us pay for chemistry. That's the way to do it. It's a metric that has some reliability to it. There is basis for doing it, not just guesswork. It's a known thing, how much sediment was added after we showed up on the scene as the kid buying into a Superfund site, as you said.

I want to pass on 13. That had to do with Wood Debris Group. I have no idea how they would resolve that. I've included those settlements in orphan share analysis. These are Dr. Floyd's numbers again on Table 2 dealing with CO-13. And I think that CO-13 costs, those settlement numbers, that 2.1 million, should be looked at to see how they work there. Convert that to cubic yards, see how that works to make these guys whole. I think that's an important metric to consider.

For Weyerhaeuser, I first of all think for orphan share consideration we have to be viewed as a de minimus chemical party. We have to be viewed as somebody that's performed. We're not -- we're not zero as Mr. Myers writes down out here. For this site we're not zero. We spent 3.4 million directly in the waterway and we moved chemicals along with the wood when we did that. We did a study and we -- this

5600 is exceedances of SQOs that they would had to have pick up on their order.

So I don't know how you get us to zero. I don't know how you say we haven't performed. I don't see it. I don't think that's fair or the right way to look at it. And here, these are factors that the Court can weigh and decide on in some fashion to make it right.

We have dredged a lot of material and some of that material contained wet scrubber sludge. And we did do the Battelle study. And you can run how much ever credit, maybe it's 50 percent, maybe it's -- I don't know how much credit you think we'll get out of that. You can run the $72 into that and it will give you a cubic yard that we did against Kaiser. And I think it should be thought of as an orphan share credit.

Like I said, there is settlement of funds to consider. There is future Kaiser Asarco settlements. We don't know what those are. It's something for the Court to ponder.

I have to say this, plaintiffs have been pretty unrelenting here with Weyerhaeuser. And the effort to make us a chemical party in spite of all this historical stuff, I think the Court can weigh that. You may not feel that way. I think it's an important fact. We have had to fight this thing tooth and toenail for two and a half, three years now and we're a de minimus chemical party. There is no question

the evidence showed that. I think that is a factor.

You've mentioned in the neighborhood and I agree we're in the neighborhood. We wish we weren't. In fairness, I don't think that should be a penalty just because we're in the neighborhood. I think it should be viewed in the sense of Wood Debris Group site at the neck and Upper Turning Basin and see what everybody did and how they contributed. I don't think there should be some massive penalty for that.

I don't feel like the 1970s level of environmental sophistication was high enough to blame us for not doing due diligence. Who would have looked in the waterway in 1970? They didn't even look upland. No one would have looked in the waterway to see there is PCBs and arsenic and wet scrubber sludge there. This wouldn't have happened. I don't think -- I think the statute allows us a defense there for those chemicals in the waterway.

Performing parties and economics, these are all big companies. As a factor I don't think that helps. Regulatory cooperation, I don't think that helps. Both parties have cooperated with the respective agencies. I didn't call the Gore factors. I don't think it helps.

They've asked for 18 percent of all the future costs. I don't think that is right. I don't think it's fair. The MTCA future cost Weyerhaeuser has under its order, we've got a -- up in Wasser Winters there is a large area where all

those rafts were that called NEBA, Net Environmental Benefit Area. If that doesn't recover we got to be out there re-dredging a very large area. They've got to monitor that. Nobody knows how that will work out. It can go the other way. And there is more dredging cost for the wood debris companies.

All the wood debris companies had to implement what is called this OMMP plan. So they're -- all of them are having to work on the waterway to keep as much wood waste out of the waterway as they can. That's a continuing cost to comply with and report on.

So Weyerhaeuser has its own set of future costs that the Court should consider. We shouldn't -- as a de minimus party, to be honest, we shouldn't be imposed CERCLA future cost. Shouldn't happen.

Let me go to my harrowed attempt to give you something to work with. There is not -- I want to show you the next slide. What I'm doing at the end of the day here, Judge, I'm saying let's look at who did what, give them credit and adjust it on the right as you see fit to adjust it.

The end-of-day analysis is on this second sheet. I want to tell what you assumptions I put in to the calculus here. I need to go through the comments.

MR. MYERS: Your Honor, I don't want to interrupt Mr. Coldiron as he goes into this, but I think his time is up

and we want to make sure that we have our adequate time.

THE COURT: We're going to do --

MR. COLDIRON: I'll do this in five minutes.

THE COURT: And you'll have your 35 minutes.

MR. COLDIRON: The two key assumptions here -- three or four of them -- is the Hylebos wood debris site, Comment 4 is that the $72 that Mr. Dovell came up with, that's the key metric to use here. And then you've got settlements and that converts -- that settlement converts to 30,400 cubic yards. In my analysis I assign all the orphans 30 percent of all volumes. That's hefty, but Kaiser was pretty hefty and who knows about Asarco.

If you want to follow along here, I looked at all areas where people dredged and what those volumes were. And that gives you a total volume. They dredged in 13, 14, and you can see who did what where. And what I've done in 14 is I've subtracted or I've taken -- I assume the Court was going to make us pay for the wood, so I've subtracted from the plaintiffs' volume the wood volume out of 14.

So you can play with that number and make it the way it needs to be. But at the end of the day you end up with total volumes that everybody dredged. And, of course, you see Manke is twice as much as the plaintiffs here. Weyerhaeuser is 24,000 and LP is not really a player here, they had too small a volume.

Then I looked at SQO exceedances. You can see Manke and -- Manke had 41,000. And to me that's orphan share. That's chemicals that nobody paid for. It's wet scrubber sludge and PCBs and whatnot. And we know ours is wet scrubber sludge from Kaiser. So in fairness would say you adjust orphan share that you're going to calculate down -- you credit this volume and see what you turn up with. So when you run -- keep that number in mind.

When you look at these adjusted volumes, which gets everybody lined up, then you run 30 percent on that volume, that shows you how much volume each party really moved in terms of dredging orphan share. And you can see Manke moved 27,900. When you subtracted the 27- from the 41-, they're 13,000 more than the percentage at 30 percent. Weyerhaeuser is barely over by 16- and then you've got the plaintiffs here at ten eight.

Now, I did not adjust -- I did not adjust the plaintiffs' numbers here for any share they should be bearing. I think the Court should do that. Let's say you view them 25 percent responsible for the whole side orphan share wise, you would cut that volume in half, adjust that number by whatever you think their responsibility under Pinal Creek would be for their share of the orphan share.

It certainly wouldn't be unreasonable to say that, you know, they're 25 a piece or 30 percent a piece and everybody

else is ten. So that's the calculus there.

I'm going to move on to this last chart. You can see that Manke paid a large excess. This is not complicated math, it's a logic diagram to weigh it. You can see Weyerhaeuser was under by adding wood volume in CO-14, that created a shortfall. We didn't net on our SQOs out in front of our dock. We're under 1600. But if you give us any credit at all for Battelle -- I took all the credit -- that is 26,000 cubic yards. That leaves us over 24,000. That would make us larger than anyone else in excess. LP is under by 1170. And General Metals, they're 10,800 when you subtract the settlement money. Here's where the settlement money comes in from the prior page.

Right here is settlement volume for 2.3 million. You divide it in half. You see that this nets out -- take the ten eight, they're -- they've got an excess. They're totally made whole. In fact, even if you credit the 6,000, 3,000 yards a piece for CO-13, they're still 1300 yards more than -- because of the credit from the performing -- from the settlements.

So that was the way I conceptualize this. It's a way to let you see if people are being treated right. I think it will help the Court to consider it that way. Thank you.

MR. McCARTHY: I thought chemistry was complicated.

Mr. Myers and I are going to share our rebuttal time as

hopefully we'll share some liquid refreshment when this is all over.

Your Honor, I would like to start with a third-party defense. And I'll try to be brief but go slowly for Nichole on this as we're getting towards the end of the day. But Weyerhaeuser's third-party defense. That argument was briefed in summary judgment. And the Court found that they were liable.

Do I need to go into the third-party defense?

THE COURT: No. Legal matter, I understand it. I'm going to look at it.

MR. McCARTHY: But the judge already ruled they're liable.

THE COURT: I understand. At this point I'm not persuaded to change my mind. But I'm going to look at everything in coming up --

MR. McCARTHY: Then just briefly, if you're going to look at it again, to qualify for the third-party defense under CERCLA you have to have absolutely no connection with any contamination at the site. You cannot be in a contractual relation with anybody who did, and they bought the property from Kaiser.

THE COURT: Third-party defense in the motion, if you'll remember, was related to Foss and others. That was as an independent contractor and so forth. I didn't buy that

argument at all. The third-party defense today really was your Exhibit 11. So it's oriented in a different direction. That's my recollection.

MR. McCARTHY: That's fine, Your Honor. And they cited Section 9601 Q, which is, I think, about three or four pages long of the requirements that you have to do as far as due diligence. And although I know Weyerhaeuser purchased the property in 1970, CERCLA is retroactive. They just don't qualify.

Weyerhaeuser's contribution claim, they didn't brief that in their trial brief. I thought they had dropped it, but they haven't.

THE COURT: Are you talking about the offsets?

MR. McCARTHY: No, Your Honor, simply that -- this is Exhibit 581, I believe, which is the plaintiffs' consent decree with EPA. And this is the plaintiffs' contribution protection clause, Section 100. Here, unlike the Wood Debris Group's consent decree, this contribution protection clause defines matters addressed and it includes all response actions taken or to be taken and all response costs incurred or to be incurred by the United States settling defendants, party implementing remedial design and remedial action in the mouth of the Hylebos Waterway or any other person with respect to the Hylebos Waterway problem area, which included the area -- the Upper Turning Basin.

And, Your Honor, there wasn't much time over the lunch hour to do any research, but there is ample case law in the record. I'll cite one case that also has -- it's useful because it cites other cases, but this is the first one I could find in the time that we had. But it's well established that the CERCLA contribution protection preempted state law claims for contribution and indemnity. And the case is *Alcan Aluminum* -- this is another unreported case, I apologize -- *v. Butler Aviation-Boston, Inc.*, from the middle district of Pennsylvania, 2003 case. The cite would be -- it's a LEXIS cite, 2003 U.S. Dist. LEXIS 16435.

MR. KLEIN: We concede they have CERCLA contribution protection.

MR. McCARTHY: It preempts --

THE COURT: That's fine.

MR. McCARTHY: If you look at this page, it's page 9, there is ample case law from other circuits on this issue.

THE COURT: Okay. I think that the contribution claim --

MR. McCARTHY: This is the total defense. Our contribution protection that we received under our consent decree is a complete defense.

I want to touch briefly on the settlements.

Your Honor asked Mr. Coldiron about the settlements with all the wood-related parties, what those settlements were

for.

First of all, each of the Dunlap settlements had to do with both wood and arsenic and other chemicals associated with Asarco slag. It was not just for wood. And as Weyerhaeuser demonstrated, there is a clear demarcation. That area is 12 and 13. That's where the Dunlap operations were. All those parties were both chemical parties and wood parties. And their operations only affected CO-12 and CO-13.

If we go to LP and Manke, they were also slag and wood, and their liability in the neck of the waterway was because they tied up at Pennwalt tie and their log rafting activities impacted CO-12 and 13. None of the these settlements had anything to do with CO-14.

THE COURT: Manke didn't -- I don't think Manke, as I recall, had very much slag. I can't remember them being part --

MR. McCARTHY: That was one of the hooks that the EPA --

THE COURT: Right, but I don't think -- okay. But I don't think they had very much, if I recall. They were not involved in the log sort yard litigation. I know that.

MR. McCARTHY: That -- all I know is that they were, as far as their CERCLA liability and their settlement, one of the factors.

THE COURT: Okay.

MR. McCARTHY: On the issue of settlements counsel also suggested to the Court that if the Court allocates CO-14 to Weyerhaeuser it should first take back a share -- back out a share of the settlements, some kind of proportional share of the settlements. There is not a settlement --

THE COURT: I think I spent the settlement in narrowing the focus to CO-14. You've indicated CO-12 and 13 were -- people paid for wood and so forth. And I'm focusing on CO-14 and sort of --

MR. McCARTHY: Then our position, if you're to focus on CO-14, the settlements didn't have anything to do with CO-14.

THE COURT: I understand that, but the Pennwalt tie and so forth, and chemicals, if any -- go ahead. I think -- in deciding preliminary that I was going to focus today primarily on CO-14, I think I spent the settlement money and attributed that already, allocated it already.

MR. McCARTHY: Before we lose focus on CO-12 and 13 I want to make a few comments on that. The impact of CO-12 and 13, in addition to the chemicals, was log rafting. And the log rafting occurred from 1966. And I believe I've seen log rafting, at least since I've been involved in this case, that occurs in that area. So that's about 40 years.

The Dunlap operators operated for 20 -- half of those years. The rest of the time it was pretty much

Weyerhaeuser's log tie. I think we had testimony from Mr. Lewis from Foss who said that, at least while he worked there '88 to 2002, there were log rafts from Weyerhaeuser nearly every day.

And then also speaking about Dunlap, there is an orphan share there. For the 20 years of Dunlap operations, ten of those -- the site was operated by Johnson-Byers, Goodwin Johnson, related entity. And they're not here. So there is -- half of that is an orphan share.

Orphan shares. We're moving right along here. Well, we've dealt with that issue. We've dealt with that issue in CO-14.

I wanted to touch on contribution protection and Russ McMillan's testimony. The plaintiffs make -- they quoted, conveniently, the cross-examination of Mr. McMillan regarding language, regarding the definition of "site" in that subtidal area. Mr. Klein didn't mention Mr. McMillan's -- I believe he didn't mention his direct testimony on the issue of what was the intent. Mr. McMillan's testimony was consistent with the '99 interchange with the proposed language. That was Ecology rejected attempts to apply contribution protection to the plaintiffs.

Couple of comments on the *Acushnet* case. First of all, it's inapposite. Unlike -- *Acushnet* is a generator case. You don't have an owner/operator. You have a de minimus

generator in the case. It was found that there was negligible harm by the de minimus generator's activities.

Here the wood waste issue is completely different. It's acknowledged by everyone there is serious environmental harm caused by that.

Also, we strongly dispute this whole de minimus argument about chemicals in CO-14. If you compare CO-14, PAHs is the driver. We have two acknowledged sources, one is huge and an orphan. You have Weyerhaeuser saying, Well, I own the property and I contributed some of the chemicals, but I'm so much smaller than this person who isn't around here to pay.

Let's compare Weyerhaeuser, their de minimus, with the plaintiffs as far as PAHs in CO-14. Are we demicromus or -- are we subatomic? It's not even on the scale. So I think that de minimus argument is something of a red herring if you're focusing on CO-14.

Just one final note, Mr. Klein, in his closing he was talking about how the HCC or the plaintiffs could have challenged EPA's directive to us, the Allison Hiltner letter, at some point like when the administrative order was -- the unilateral order was issued against us.

THE COURT: I just asked that question because I was curious.

MR. McCARTHY: My understanding of CERCLA, because I've represented parties who have received collateral orders

under Section 106, there is no pre-enforcement review. You have to do the entire cleanup before you can do anything. If you don't obey that order, EPA cleans it up in their thrifty way and then you get assessed treble damages. So this 50-million-dollar cleanup would have been a hundred-million-dollar cleanup times three.

THE COURT: That is why Mr. Beverage is making wine now.

MR. McCARTHY: So just on that issue I think that's all I have to say. I will pass to Mr. Myers.

THE COURT: Thanks.

MR. MYERS: Your Honor, again, before we leave the issue of de minimus, the cases, as I understand -- I haven't spent a whole lot of time reading unpublished cases. I'll be first to admit that. In my quick review of the pieces that Mr. Coldiron pulled up, I think those are all generator cases.

THE COURT: I'm going to look at them.

MR. MYERS: Those are cases where you have a burning house and somebody is throwing a toothpick on the burning house. What the courts are saying, Throwing a toothpick on a burning house isn't the problem.

Here, Weyerhaeuser owns the burning house. They own CO-14. Whether they are, as they claim, a de minimus chemical source, which I think is completely contradictory to

the evidence, or not is irrelevant.

What is relevant here is they own the property. It's their property. Arkema and General Metals never contaminated it. This nonsense about there being PCBs driving cleanup. The evidence is that PCBs never drove the cleanup anywhere in CO-14. They may have been detected, but they were never at levels that required any remediation in CO-14. It's Kaiser PAHs, it's Weyerhaeuser PAHs, and it's a huge volume of wood waste.

Regarding release, Mr. Coldiron showed you the definition of "release" under CERCLA. And, again, looking at that definition of release it says nothing about a hazardous substance having to be released or having to be the substance. What it says is that there has to be a hazardous substance released, not that the original material had to be itself a CERCLA or MTCA hazardous substance. And I would like -- I'm sure you will look at that closely again.

But, again, the term "release" talks about it getting out into the environment, these harmful products getting out into the environment. Then the legal liability is if there has been a release or threatened release of a hazardous substance from a facility. And that has clearly happened here from what has occurred on Weyerhaeuser's own property in CO-14.

THE COURT: So you would look at -- in terms of cases that focus on whether a hazardous substance is contained

within a material, the focus shifts really from the tree to the facility?

MR. MYERS: Your Honor, I'm not smart enough to understand all the science and chemistry. Mr. McCarthy has a good handle on it. Mr. Coldiron has a good handle on it. I don't.

THE COURT: Okay.

MR. MYERS: All I know is that on Weyerhaeuser's property, from the evidence both by the Wood Debris Group, by the HHCG, by the experts, it's undisputed hazardous substances have been released from the wood waste piles in the water in CO-14 on Weyerhaeuser's property and on the property that Weyerhaeuser exclusively uses.

Quickly, I'm doing kind of the kibbles and bits here, the issue of threatened release. Mr. Klein argued that they have to cause the incurrence of response costs. Here, these threatened releases, as listed in EPA's directive, the HHCG spent $11 million investigating releases and threatened releases chasing down things like ammonia and other substances. There has been substantial costs incurred on the issue of threatened releases.

On the issue of what drove the remedy, again, if you look at the chemical data, you look at the data that was available at the time the decisions were made to clean up, that data showed that the driver in CO-14 was absolutely PAHs and wood

waste. And it was wood waste because of the biological failure in that one station in CO-14 that had almost no chemicals. It had one low SQO exceedance that elsewhere at higher concentrations showed to have no adverse biological effect.

It wasn't just our expert saying that here in this lawsuit. That was EPA's position. And that is what resulted in that November 3, 1998, letter where words matter and where EPA says, You have to expand your cleanup and you have to take care of wood waste because wood waste is causing biological problems, biological effects.

That resulted in 100,000 cubic yards, plus or minus, going into those blue areas. And those were the areas that we had to address.

Again, as part of this cathartic experience we're having --

THE COURT: I know you're going to miss us all.

MR. MYERS: I want to comment on the PCBs. I feel that Weyerhaeuser didn't hear the testimony on that issue. General Metals never said they were not a source of PCBs. Mr. Cusma said, Yes, we are a source of PCBs. Key issue is they're not the sole source. So if you find PCBs at the outfall of the Kaiser Ditch and they're PCBs in the Kaiser Ditch and they're PCBs released to the environment on numerous occasions in sizable amounts on Kaiser's property

that drains to the Kaiser Ditch that goes out into the sediments --

THE COURT: You should have talked to Mr. Farlow about wet scrubber sludge. I feel the same way.

MR. MYERS: I'll pass, Your Honor, on that. I have some responses, but I don't want to make them.

I would like to address this issue: Weyerhaeuser continually says and claims that they had to dredge in front of their own dock because of chemicals. That is baloney. The data that was taken at the time decisions were made to clean up, there was no chemical exceedance in front of their dock that triggered any cleanup requirement.

Where did these chemistry levels come up that they point to in DMMU 2 and 5 and 10? They come from PSDDA sampling.

What is PSDDA? Puget Sound Dredged Disposal authority or agency [sic], whatever it is. I always forget what the "A" is.

The tests here were done after the decision was made to dredge. The tests here were done to characterize this sediment for disposal purposes, not to decide where to dredge, not to decide -- not to drive any decisions on where to dredge. It was for disposal purposes.

What did they find when they did that and then they did their bioassay sampling? They found that two of the three had had no bioassay failures and could go to PSDDA, where

they intended to take it anyway. And one did have a bioassay failure, but it was surrounded by three others with no chemicals that also failed bioassays. To say that chemicals drove their need to dredge is completely disingenuous.

Last thing I would like to touch on, I think, is the issue of bathymetry. Your Honor, in the Bean case, as I understand it, the bathymetry issues involved taking a pre-dredge and a post-dredge survey using the same equipment, same methods, to determine volume, areas dredged and so forth. That is not what Dr. Floyd did.

What Dr. Floyd did is took a survey from 1965 using some type of equipment, she thought lead line, and comparing it over a 30-year period with various dredging techniques that she had no idea what they were used -- what -- what was done. That is inappropriate.

She also missed the fact that in her key area, CO-14, Weyerhaeuser dredged in 1976 and went much deeper than the line she was using. And the testimony is in CO-14 that that dredge -- that those areas went five feet or more of wood waste deeper than what the deepest historical bathymetry show.

So her reliance on that methodology is number one, it's not an appropriate methodology to use; number two, it was shown to be flawed in the actual data in the observers that were doing the dredging; and number 3, it was also flawed

because Weyerhaeuser at their own dock found the exact same problem. Their own dredging went several feet deeper in front of the dock than what the bathymetry showed.

To be able to create these calculations of 5500 cubic yards, or whatever it is, is completely fiction because the methodology is inappropriate and the -- and the facts of the site show that it's contrary to the evidence.

And with that, Your Honor, I am going to stop. Thank you.

THE COURT: Thank you.

All right. As they say at the Circuit, the case is under submission. And my aspiration is -- I've got a lot of reading to do on motions for summary judgment tomorrow in a case and it's a big stack. So I'm not going to be directing much attention. But over the weekend I hope to -- cribbing in part, perhaps, from your respective findings and conclusions, get a decision out. I've got meetings Monday afternoon, Tuesday, Wednesday, and Thursday of next week. So if I don't get it out Monday morning it won't be until the end of next week that I get it out.

There are some things I want to review and I think -- the easy part, ultimately, has become the facts. Oddly enough, most of the time the facts lead to a logical and self-evident conclusion in most cases. This is not one of those cases because there are significant issues that I think would perplex anyone about what a fair and reasonable allocation is

for Weyerhaeuser in this case. I'll wrestle with that and do the best I can.

Let me say before you all leave what a pleasure it has been to have you all here. This is an interesting case. It's a subject matter which I have some familiarity but not nearly the level of expertise that you all have.

And I have greatly appreciated the manner in which you've presented the case, the spirit with which you have cooperated one with another. And I will tell you, a good friend of mine, when he was president of the state bar, dedicated the year to a series of articles on why he was proud to be a lawyer. And I will tell you that your performance here over the last five or six weeks has made me proud to be a lawyer.

MR. MYERS: Your Honor, on behalf of the plaintiffs, and I'm sure on behalf of Weyerhaeuser, we would like to thank Jean and Nichole for their courtesy and cooperation and patience in putting up with us. We really appreciate their efforts to make this go so smoothly.

THE COURT: I'm sure Nichole accepts it. It may be too little too late for Jean.

Thank you. Court in recess.

(Proceedings concluded.)

C E R T I F I C A T E

I, Nichole Rhynard, CCR, CRR, RMR, Court Reporter for the United States District Court in the Western District of Washington at Tacoma, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 17th day of July, 2007.

/S/ Nichole Rhynard

Nichole Rhynard, CCR, CRR, RMR

Official Court Reporter